No. 83.

THE STATE OF TENNESSEE

EX RELATIONE

JACOB BLOOMSTEIN

v. { IN THE SUPREME COURT OF THE UNITED STATES.

THOMAS H. SNEED,

COLLECTOR.

ARGUMENT OF

R. MCPHAIL SMITH.

FOR THE PLAINTIFF IN ERROR.

BRIEF.

STATEMENT.

(References are to pages of the argument.)

This was a *mandamus* to compel the collector to receive in payment of the appellant's taxes, "new issue" of the Bank of Tennessee,—notes issued *after* May 6, 1861,—when the State plunged into the rebellion.

By section 12 of the bank charter, the State, in 1838, contracted that the notes of the bank should be "receivable at the treasury, and *by all tax collectors* and other public officers, *in all payments for taxes* or other moneys due the State." (p. 1.)

Furman v. *Nichol*, 8 Wal., 44, established this liability as to the "old issue,"—the notes issued *before* May 6, 1861.

The reconstructed State, in 1865 and 1866,—by constitutional amendment and ordinary legislation,—undertook to destroy the new issue,—mistaking it for rebel State currency emitted in aid of the war against the Union. (ps. 3, 4.)

The legislation of 1873 prescribed what should be receivable for taxes,—to the exclusion of the new issue, and took away all real remedy from persons claiming to pay taxes in other funds than those prescribed as receivable. (ps. 17, 18.)

In a suit brought to wind up the Bank of Tennessee, in which suit all possible objections were urged against the new issue, these notes were, after a most thorough and exhaustive investigation, completely vindicated, and pronounced valid, and entitled, equally with the old issue, to priority out of the assets of the bank. (ps. 11, etc.)

But when afterward it was therefore sought, under *Furman* v. *Nichol*, to compel a collector to receive new issue for taxes, in accordance with the State's contract in sec. 12, the State supreme court denied the relief upon two grounds:—

1. That the legislation of 1873 had taken away from the courts the jurisdiction to award a *mandamus* against the collector to compel the receipt of the new issue for taxes; and that, aside from this, the jurisdiction had been previously taken away by the act of 1865, withdrawing the privilege of suing the State,—the *mandamus* against the collector being pronounced to be a suit against the State in order to bring it within the grasp of this act.

2. That the State's contract contained in sec. 12 of the bank's charter, had, as to the new issue, been validly *repudiated* by the legislation of the restored State government.

ASSIGNMENT OF ERRORS.

1. The first error complained of is, that the legislation of 1865 and 1873 was made unconstitutionally to destroy the note holder's remedy by *mandamus* against the collector.

2. The second error complained of is, that the State's contract in sec. 12 of the

bank charter, was, as to the new issue, held not to have been entitled to the protection of sec. 10 Art. 1 of the Constitution of the United States, and the legislation of the restored State government was declared to have validly repudiated it.

POINTS OF LAW.

I.

Chapter 118, acts of 1873, provides that "tax collectors shall receive in discharge of the taxes and other dues to the State, bank notes of the Bank of Tennessee known as old issue, warrants on the Treasury legally outstanding, gold, silver, national bank notes, U. S. legal tender notes, *and nothing else.*"

Chapter 13, acts of 1873, provides that "no court in the State has, or shall hereafter have, any power, jurisdiction, or authority, to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its Treasury, funds, or property."

Chapter 44, acts of 1873, provides that whenever any taxpayer conceives that the taxes demanded of him are unjust, etc., his only remedy shall be to pay the taxes under protest, and afterward to sue the collector,—the State promising to pay the recovery, etc.

Also, that *this* shall be the only remedy of any one claiming the right to pay *in other funds than such as are demanded.*

Also, that no officer of the State shall be "subjected to any suit for a refusal on his part to accept in payment of revenue to the State any kind or description of funds or securities or papers other than such as he may be authorized and required to receive for the time being by law."

The court held, that, even if these statutes were, as to the new issue, *unconstitutional*, yet they were effectual to take away the jurisdiction of the court to compel by *mandamus* the reception of the notes by the collector for taxes (p. 20), citing *Williams* v. *The Register of W. Tenn.*, Cooke, 214:—irrelevant; and, besides, an erroneous State decision of a Federal question.

That the acts in question left no real remedy to the note holder, see ps. 17, 18.

The court further held, that the new issue holders had had no remedy to compel the collector to receive their notes for taxes since the repeal in 1865 of the act of 1855, permitting the State to be sued. Also, that if the act of 1865 had not withdrawn the privilege of suing the State, the legislation of 1873, even if objectionable in other aspects, would have been valid at least for this purpose.

Legislation simply withdrawing the privilege of suing the State, is unquestionably innocent. It really takes away no *remedy*; for a judgment when obtained cannot be *enforced* against a State. She remains as free to refuse to comply with the judgment as she was to refuse to accede to the original demand.

The device of the court was, to manipulate the note holder's remedy so as to make innocent legislation destroy it. So they decided that his actual, effective remedy, by *mandamus* against the collector, was merely a suit against the State, and that it had been validly withdrawn by the act of 1865, and cumulatively prohibited by the legislation of 1873,—this legislation being competent at least to withdraw the privilege of suing the State.

The device of calling a remedy *not* a remedy,—a suit against the State,—a precarious boon,—in order to enable the legislation in question to destroy it, was similar to the device of calling a contract *not* a contract, in order to enable hostile

State legislation to repudiate it, of which specimens were presented in the Ohio bank cases,—*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, etc. (p. 22.)

Whether the *mandamus* against the collector was, or was not, a suit against the State, is the *turning point* of the general Federal question,—Has the obligation of a contract been impaired here by State legislation?—just as the question o contract or no contract was, in the Ohio bank cases; the question of bridge or no bridge, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wal., 141; and the question whether the State's contract ran with the notes or not, in *Furman* v. *Nichol*, 8 Wal., 44;—all being non-Federal questions in the abstract, but Federal through their relation to the general Federal questions of these cases respectively, which *hinged* upon these points. (p. 23, etc.)

That all the points involved in the Federal question are to be decided by this court for itself (although non-Federal except as related to the Federal question) see *Jefferson Branch Bank* v. *Skelly*, 1 Black, 443; *Furman* v. *Nichol*, 8 Wal., 44; and, strikingly, *Delaas* v. *Insurance Co.*, 14 Wal., 661,—where the Court, after overthrowing the offending State constitutional provision, refused to let the decision stand on a non-Federal leg on which the State supreme court *might* have placed it impregnably. (ps. 22, 23.)

That the *mandamus* was *not* a suit against the State, see *Osborn* v. *U. S. Bank*, 9 Wh., 738; *Davis* v. *Gray*, 16 Wal., 220; *Polack* v. *Mansfield*, 44 Cal., 36; *Jackson* v. *Wilcox*, 1 Scam., 344, and 13 Pet., 498; *Grisar* v. *McDowell*, 6 Wal., 370; *Board of Liquidation* v. *McComb*, 2 Otto, 531. (ps. 29, etc.)

That the State supreme court has not regarded suits since 1865, to restrain the collection of taxes, as trespasses upon the immunities of sovereignty, see *Friedman* v. *Mathes*, 8 Heis., 500, etc., etc. (ps. 27-29.)

That the *mandamus* was a familiar remedy, existing at the time sec. 12 was enacted (in 1838), see the *mandamus* act of 1831 (p. 26).

That it attached to the contract in sec. 12; and that to take it away by subsequent legislation was to impair the obligation of the contract: *Walker* v. *Whitehead*, 16 Wal., 317. (p. 26.)

II.

On the second branch of the case, not much is to be said; as the rulings complained of were simply preposterous.

It was not intimated that the notes involved were issued in aid of the rebellion. It was repeated (it had been settled in 1875, in the bank case,) that, *as between the holders and the bank*, they were valid,—and were entitled to the constitutional guaranty, against the flagrant legislation of 1865-6,—which was held to have been invalid to impair their obligation upon the bank or its assets.

But the State's obligation in sec. 12 as to these notes (issued in 1861) was degraded into a sort of *caput lupinum* which it was allowable for the restored State government to knock in the head at pleasure. (ps. 36, etc.)

It was held that sec. 12 must, *as to these notes*, stand upon a reenactment or tacit recognition by the rebel State government in 1861,—and that therefore it was outside of the protection of sec. 10, Art. 1, Constitution of the United States. (ps. 36, etc.)

It was not explained how the State's contract as to the notes, impressed upon them by sec. 12, enacted in 1838, came to be the act of the State government of 1861; not how, if it were, this, without more, exposed it to repudiation by the restored State government.

It was not supposed that there had ever been any *repeal* of sec. 12, so as to make its reenactment necessary. It was not supposed that there had been any *actual* reenactment of the section in 1861. It was not suggested how, if there had been, this *superfluous* reenactment could have put the section on a new basis.

Not even a superfluous reenactment, however, was exacted for this. The mere *tacit* recognition of sec. 12 by the rebel State government, was held sufficient.

But this far-fetched whimsey has not even the merit of yielding, if conceded, the desired conclusion.

For no rebellious taint is cast upon this imaginary action of the State authorities; and the innocent contracts of the State government of 1861 were valid, and entitled to the benefit of the constitutional guaranty. *Huntington* v. *Texas*, 16 Wal., 413; *Horn* v. *Lockhart*, 17 Wal., 571; *Sprott* v. *U. S.*, 20 Wal., 464; *U. S.* v. *Insurance Co.*, 22 Wal., 102.

Action of Supreme Court of Louisiana, after the secession, held valid:—*White* v. *Cannon*, 6 Wal., 443.

Loyal city government of Richmond held liable for trespass of rebel city government;—*Richmond* v. *Smith*, 13 Wal., 429.

If the judicial department of a rebel State could act validly, so might the other departments.

If a rebel city government could entail upon its loyal successor liability for torts, a rebel State government might entail liability for innocent contracts.

In *Furman* v. *Nichol*, 8 Wal., 44, the first point raised in the present case was equally involved; for the suit was commenced after the act of 1865 had withdrawn the privilege of suing the State; ps. 20, 21.

In *State* v. *Stoll*, 17 Wal., 425, the second point of the case was equally involved.

The points were not raised, because it was known there was nothing in them.

The second point might, in *State* v. *Stoll*, have (under Rule 21, § 8) been noticed by this court, though not assigned;—and it certainly would have been, had it been thought to be a "point."

ARGUMENT.

MAY IT PLEASE YOUR HONORS:—

The present case is supplementary to *Furman* v. *Nichol*, 8 Wal., 44, which involved the obligation of the State of Tennessee to receive for taxes the "old issue" of the Bank of Tennessee—the notes of the bank issued before May 6, 1861—the date when the State attempted to sever her relations with the Union.

The present case involves the obligation of the State to receive for taxes the "new issue" of the bank—the notes issued after May 6, 1861.

Section 12 of the charter of the Bank of Tennessee was as follows:

"*Be it enacted*, That the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury, and *by all tax collectors* and other public officers, *in all payments for taxes*, or other moneys due to the State."

The notes now involved were all issued while only gold or silver coin was a legal tender for their payment.

Down to the rebellion, the obligation contained in section 12 of the bank's charter was duly regarded by the State, the notes of the bank being all the while at par, or nearly so. But the bank came out of the rebellion badly crippled, and with its notes greatly depreciated, and then it became inconvenient for the State to remember her pledge, and she resolved to repudiate it. This iniquity, rebuked and thwarted in *Furman* v. *Nichol* as to the old issue of the bank, afterwards gathered head for a second effort—this time against the new issue.

The present contest will be found with even less semblance of merits on the part of the State than the former.

In *Furman* v. *Nichol*, the counsel for the State assailed the notes there in controversy, as having possibly been reissued after

May 6, 1861, assuming that, if so, this must have been in aid of the rebellion.

"This court," said they, "will not validate the acts of rebels and robbers who seized on the bank and reissued notes in this unlawful manner."

The opposing counsel contented themselves with pointing out that there was no evidence that the notes in controversy were reissued after May 6, 1861, and did not think it worth while to repel the assumption that, if so reissued, this must have been in aid of the rebellion; and thus an impression was left on the mind of the court that the issues of the Bank of Tennessee after May 6, 1861—the new issue—were emitted in aid of the rebellion.

The court said that there was no evidence that the notes in controversy were improperly issued, adding:

"This case is therefore not embarrassed by the changed relation of the State after 1861, and the discussion of the principles that settle this case is not intended to apply to the issues of the bank while under the control of the insurgents, because such a case is not before us, and it will be time enough to decide the important questions which it would present when it arises, if it ever should arise."

The case has now arisen, but it will be found to be no more embarrassed by the changed relation of the State after May 6, 1861, than was *Furman* v. *Nichol*.

Whether or not the new issue was emitted in aid of the rebellion, was one of the questions impliedly settled in our favor by the State supreme court; and the case being here upon *our* writ of error this question is not, I take it, now within the field of controversy. It is obvious that if the State supreme court could possibly have decided that the notes involved were void because guiltily issued, they would not have had to strain their ingenuity for such grounds of adverse decision as are now presented for revision.

This question and others that were discussed before the State supreme court in the present case have been settled in our favor by that court, also in the case of *The State of Tennessee and Samuel Watson, Trustee*, v. *The Bank of Tennessee and others*, the record of which suit, as it existed at the time of its entrance into

that court, was by agreement incorporated with the record of the present suit, (paragraphs 46 to 255, comprising the bulk of the transcript).

The last mentioned suit was brought for the purpose of winding up the Bank of Tennessee in accordance with an assignment pursuant to the direction of the State legislature, by which it was attempted to repudiate the new issue; and in the progress of the case every conceivable objection was urged against the validity of the money; but all in vain: and the quality of the present extraordinary decision can hardly be duly appreciated without a cursory review of the bank case.

The two decrees of the Supreme Court of Tennessee in that case are set forth in the appendix to this argument. I exhibit also certified copies of them. The opinions of the judges have not yet been published, but the grounds of the decisions are very fully recited in the decrees themselves.

* * * * * * *

The convention that met at Nashville on January 9, 1865, amid the din of the conflict not then ended, to reconstruct the State government,—composed, as it was, of men unused to, and ignorant of, affairs,—conceiving that the Bank of Tennessee was a mere organ of the State, instead of a bank for ordinary banking purposes, (a fallacy, by the way, which it has required repeated decisions of this court to crush*) imagined that its issues after May 6, 1861, were simply *rebel State obligations* emitted, like Confederate money, to supply the sinews of war against the Union; and, accordingly, they provided, by section 6 of the Schedule to their amendments to the State Constitution (adopted February 22, 1865), as follows:

"SEC. 6. All laws, ordinances and resolutions of the usurped State government, passed on or after the 6th day of May, 1861, providing for the issuance of State bonds; also, all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th day of May, 1861, and all debts created or contracted in the name of the State by said authority, are *unconstitutional*, null and void; and no Legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The bank notes, equally with the State bonds and debts, are

*See p. 10, note †.

pronounced "*unconstitutional*," and supposed to require legislative provision for their redemption. Obviously, State bonds, debts incurred in the name of the State, and notes of the Bank of Tennessee, are here regarded as standing together in the category of rebel State obligations, which the loyal State might disavow.

Under the same impression as to the nature of the bank, and of its issues after May 6, 1861, the first Legislature of the reconstructed State government, by the act of February 6, 1866, ordered the President and Directors of the Bank of Tennessee to execute an assignment of the effects of the bank, for the benefit, first, of the school fund, and, secondly, of all the creditors of the bank whose claims arose before May 6, 1861—"*excluding all claims and demands of all kinds, of date after May 6, 1861, as absolutely null and void.*"

The act required the Attorney General to file a bill to carry out the assignment.

On May 4, 1866, the assignment was executed to Samuel Watson as trustee, with preferences as decreed by the Legislature.

On May 16, 1866, the Attorney General filed his bill as directed, in the chancery court at Nashville, in the name of the State of Tennessee and Samuel Watson, trustee, against the Bank of Tennessee, its creditors, and others, praying to have the effects distributed under the orders of the court, according to the provisions of the assignment, and to have all creditors enjoined from suing the bank, and required to file their claims for adjudication in the case. The injunction issued as prayed for.

The bill alleged that Watson could not qualify as trustee under the assignment, from inability to give the enormous bond required therefor; and thereupon the court, on May 21, 1866, appointed him a receiver in the case, under a bond of $50,000 only.

Various answers were filed by different parties, to the Attorney General's bill.

Mark R. Cockrill, a depositor,—on behalf of all the creditors of the bank,—and, afterward, B. R. McKinney and other depositors,—by cross bills;—and, still later, T. A. Atchison and W. M. Duncan, holders of new issue, in their answer,—impugned the act of February 16, 1866, and the bank assignment thereun-

der, as void, because in impairment of the obligation of contracts; urging that, by virtue of the charter of the bank, its capital stock, including the absurdly preferred school fund as a part of it, was pledged as a trust fund for the payment of the debts of the bank, and that it was not competent for the State to expunge the debts of the bank incurred subsequently to May 6, 1861, or to deprive them of their equal right, with other debts, to participate in the distribution of the assets of the bank.

The McKinney bill sought, but of course ineffectually, to make the State live up to its obligation to the capital stock of the bank.

Section 1 of the bank charter provided:

" . . . —and the faith and credit of the State are hereby pledged for the support of the said bank, and to supply any deficiency in the funds hereinafter specifically pledged, *and to give indemnity for all losses arising from such deficiency.*"

Section 2 provided that the capital stock of the bank should consist of the school fund; the proceeds of the Ocoee lands; the surplus revenue on deposit with the State; and, in addition to these amounts, specie,—

"or funds convertible into specie at par value, on the faith of the State, sufficient to make the whole capital FIVE MILLIONS of dollars."

Section 12 provided, as we have seen, that the notes of the bank should be receivable for taxes.

The capital of the bank, however, never was more than $3,600,000, and it has been wasted and plundered until but a small fraction of that now remains.

Yet in Tennessee it would excite only derision for any one seriously to urge that the State should take some step toward making good its solemn pledge to the creditors of the bank, "to give indemnity for all losses arising from such deficiency."

Were the State a solvent individual, this liability to keep the capital stock of the bank up to $5,000,000 would supply an immense trust fund, which, at the instance of creditors, the chancery court would compel to be paid in; and then there would be a superabundance for them all. But being a State, she may skulk behind her sovereignty, with on other penalty than that of infamy.

Not content with callously ignoring her liability to the capital stock of the bank, the State attempted, as we have seen, to repu-

diate her obligation to receive its old issue for taxes; and she is now attempting to repudiate her obligation so to receive the new issue.

But fortunately for the cause of justice, her obligation to receive the bills of the bank for taxes is of a shape not susceptible of being shirked by non-action and unsuability.

In the course of the bank case, the State, apprehensive of having her sensibilities wounded by judicial comment if she remained before the court, begged leave to withdraw; and thenceforth the case proceeded in the name of Watson as sole complainant.

But though she formally retired from the record, she continued to take part in the contest the same as ever, being represented, not only by her learned and able Attorney General, but also by one of her most eminent lawyers, specially employed to assist. Thus she enjoyed all of the advantages, without incurring any of the liabilities, of a party,—a course of proceeding strictly in keeping with the rest of her conduct in relation to the bank.

The main features in the case were, the attempt of the State to deprive of recourse upon the assets of the bank all of its creditors whose claims arose after May 6, 1861—comprising about all of the creditors of the bank, after its old issue had been absorbed in payment of taxes,—which attempt, if successful, would have captured the entire assets of the bank, either for the school fund, or for the State as sole stockholder of the bank; the combined resistance of the depositors and new issue holders against this attempt; and the subsequent battle between the new issue holders and the depositors over the fruits of their joint victory over the State.

Under the general banking law of 1860, the bill holders of insolvent banks were entitled to priority; and, as the amount of new issue outstanding was far more than sufficient to take up all of the assets of the bank, the only hope for the depositors was, first to overthrow the sweeping exclusion of the debts of the bank created after May 6, 1861, and the preference of the school fund; and, afterward, to overwhelm the new issue upon other grounds than the mere date of its emission.

The holders of the old issue were taken out of the case by the decision in *Furman* v. *Nichol*, which enabled them to sell their money advantageously to taxpayers.

The enormous liability of the State to the bank fund precluded any claim upon her part to share therein, by subrogation to the rights of the taxpayers in old issue.

The largest element in the hostility of the State to the new issue, was, of course, her apprehension, on account of it, of a repetition of the distasteful draught of right and justice administered to her by this court in *Furman* v. *Nichol*.

And so, when the case came to be heard in the chancery court, in 1873, no stone was left unturned to crush the new issue. The Attorney General, the special counsel of the State, and the counsel of the depositors, mutually stimulating one another, bore down together upon the new issue. Only the solid strength of a thoroughly just cause, sound to the very core, could have endured unscathed the pelting of this pitiless storm.

It was, of course, attempted to taint the new issue as having been emitted in aid of the rebellion.

The Chancellor's exhaustive opinion is incorporated with the record of the present case (par. 237, etc.). He found the following state of facts developed by the proof:

In April, 1861, shortly after the refusal of Tennessee to respond to the President's call for troops, a Military Board was organized at Nashville, for the purpose of raising, equipping and supplying troops for the rebellion. In order to furnish the necessary means, the State issued what were known as its war bonds, of which $4,300,000 were purchased at different times by the Bank of Tennessee, at par, and the proceeds placed to the credit of the State. Other banks also purchased largely of these bonds.

The Military Board checked out of the Bank of Tennessee, from time to time, $4,625,460.48.

This involved, of course, a heavy drain upon the bank, whose regular business was just as large in 1861 as it had been previously; and, to avoid embarrassment from the vacuum thus produced, the directors (who, by the way, were appointed before the rebellion) issued $1,469,299 of additional currency, of which, however, the mother bank (on which alone the Military Board checked) issued but $692,639, the branches issuing $776,660.

The issue of 1861 was not exceptionally great. It was $279,-

700 less than that of 1853; $491,701 less than that of 1854; $317,701 less than that of 1857.

The new issue, when signed, was mingled with the other funds of the bank, and the mixture paid out promiscuously upon whatever checks were presented.

The bank sold $1,077,000 of its war bonds at par.

The proceeds of these, *plus* the old issue, *plus* the notes of other banks on hand, exceeded, by $1,384,807, the aggregate of the checks of the Military Board—not to mention the specie in the vaults,—shown to have been $446,719.70.

The new issue was printed from the same plates as the old, and a large portion of it consisted of notes years before filled up and dated, ready for signing and issue, but not then used. These bills were, in 1861, signed and issued, without altering the antedating, and were distinguishable from old issue only by the anachronism of the signatures as collated with the dates. By parties ignorant as to the *personnel* of the bank government, they were, of course, undistinguishable. The officers appointed by the State, after the rebellion, to burn old issue, burned by mistake a considerable quantity of new issue.

The Chancellor held, of course, that to avoid any of the new issue as having been issued in aid of the rebellion, the particular notes involved must be shown to have been so issued.

That there was no evidence that any of the new issue in controversy had been so issued.

That, even if these notes had been originally issued in aid of the rebellion, yet, if returned into the bank and afterward unobjectionably issued, they would now stand upon the footing of valid bills issued for the first time. And that, even if not returned into the bank after the original, illegal issuance, yet, in the hands of *bona fide* holders for value, they would be exempt from their original taint.

I suppose that no lawyer would venture to gainsay any of these positions.

The question whether the new issue was emitted in aid of the rebellion, arose also in the case of *The Bank of Tennessee* v. *R. H. Jamison*, the record of which was incorporated with that of the bank case before the Chancellor (par. 179, etc.). The jury

found in that case in favor of the innocence of the new issue, (par. 182; also 197, lines 16, etc.).

The Chancellor held, of course, that section 6 of the Schedule, as well as the act of February 16, 1866, and the repudiative provision of the bank assignment thereunder, were void, as attempts to impair the obligation of contracts.

Also, that the new issue in controversy was entitled to priority of payment out of the assets of the bank, under the general banking law of 1860.

From this decision an appeal was taken.

The same counsel who had assailed the new issue in the chancery court conducted the onslaught against it in the supreme court.

There, however, the vain attempt was abandoned, to implicate any of the notes as guiltily issued.

But it was insisted that the money must be condemned as having been issued to meet an exigency produced by the rebellion.

It was also sought to revive the old fallacy (so often rebuked by this court, and rebuked also by the State supreme court*), that the State bank was identical with the State; and it was argued that, upon the rebellion of the State, *ipso facto*, all legitimate authority perished within her borders, that of the bank officers, as essentially State officers, among the rest; and that their subsequent emission of the new issue was therefore void.

And then, by viewing the bank as a mere organ of the State, it was sought to turn the new issue into rebel State obligations, which the loyal State might disavow.

It was likewise contended that the legislation of 1861 had converted the bank, from a bank for ordinary banking purposes, into a financial instrument of the rebellion. But there had been no such legislation.

But the most strenuous contest against the new issue was made from the absurd position, that every transaction in the State during the rebellion, not only of the State itself, but also of corporations, and of individuals, was at the mercy of the reorganized State in 1865, which might, if it had seen fit, by its *fiat*, have annulled them all at one fell swoop. It had undertaken to snuff out the new issue.

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*See p. 10, note †.

The notion seemed to be entertained that during the rebellion the State was, as it were, temporarily wrenched from under the Constitution of the United States, so that the obligation of contracts made during that time was not entitled to the constitutional guaranty against subsequent impairment at the hands of the State.

In opposition to these views, it was maintained:

1. That the State government of 1861 was at least a *de facto* government, and its action as such, unless repugnant to the Constitution or laws of the United States, or tainted with hostility to the United States, as valid and binding as if it had been *de jure;* and that the reorganized State could no more obliterate an unobjectionable obligation of the State than of an individual, merely because it was contracted during the rebellion; so that, even with the impossible concession that the bank was a mere State agency, and the new issue therefore State obligations contracted during the rebellion, the money would not, on this account merely, be liable to repudiation by the reorganized State in 1865.*

2. That, however, the Bank of Tennessee was no more anything else than a bank for ordinary banking purposes than any of the other banks of the State; and that, therefore, the new issue stood on the same footing as the similar issues of other banks of the State during the same period.†

3. That the rebellion did not operate to confer upon the reorganized State, in 1865, any exceptional power over the transactions, during the rebellion, of individuals, corporations, or of the State itself; that all obligations contracted during this period, unless in

*See *Huntington* v. *Texas*, 16 Wal., pp. 412, etc., where it was held that the rebel State government had power, for a lawful purpose, to aliene the property of the State. In *Texas* v. *White*, 7 Wal., 700, and *Texas* v. *Hardenberg*, 10 Wal., 68, the alienation was in aid of the rebellion.

See, as to the power of the rebel State governments to act validly and bindingly, *Horn* v. *Lockhart*, 17 Wal., 580; *Sprott* v. *U. S.*, 20 Wal., 464; and *U. S.* v. *Insurance Companies*, 22 Wal., 102.

See also, *Sequestration Cases*, 30 Texas, 700; *Pepin* v. *Lachenmeyer*, 45 N. Y., 29.

†See *Bank of U. S.* v. *Planters' Bank*, 9 Wh., 904; *Bank of Ky.* v. *Wister*, 2 Pet., 124; *Briscoe* v. *Bank of the Commonwealth* (similar in constitution to the Bank of Tennessee), 11 Pet., 257; *Woodruff* v. *Trapnall*, 10 How., 190; *Darrington* v. *State Bank of Ala.*, 13 How., 12; *Curran* v. *Arkansas*, 15 How., 309. And see the Tennessee decisions in *Fields* v. *Creditors*, 1 Sneed, 354; *Bank of Tennessee* v. *Dibrell*, 3 Sneed, 380.

themselves objectionable, were as well entitled to the protection of the Constitution against subsequent State impairment as if the rebellion had not existed at the time they originated; and that therefore the new issue, if not shown to have been emitted in aid of the rebellion, or in violation of some law of the United States, or of the State, must be adjudged valid and binding, and protected from destruction at the hands of the reorganized State in 1865, whether attempted by constitutional amendment or ordinary legislation.*

The case, being thoroughly argued, was taken under advisement until the next annual term, when the Chief Justice of the State announced, in writing, the conclusions of the court, stating that the judges were not entirely agreed as to the reasoning. The following extract from the decree in the case reproduces the language of the Chief Justice:

"The court is further of opinion, and so adjudges and decrees, that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, *had no effect in changing the character of the bank; but that it had the same power after as before these acts, to carry on a legitimate business.*"

"That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861." (Appendix, ps. 45, 46.)

Only the new issue of Atchison and Duncan was directly involved here. But the contest against this portion of the money had to be waged as it is obvious from the record here that any future contest against any of the rest of the money must proceed—upon general grounds, not confined to the particular notes in controversy. No discrimination can ever be made between any of the notes of the issue.

The foes of the new issue assuredly did their worst against the representative notes of Atchison and Duncan. The decision of the State supreme court, in 1875, settled all the questions capable of being raised against the new issue at the time when the answer of Atchison and Duncan was filed,—in 1872.

But afterward, in 1875, when other new issue holders came to

*See *White* v. *Hart*, 13 Wal., 652; *Gunn* v. *Barry*, 15 Wal., 610; *Walker* v. *Whitehead*, 16 Wal., 314. The contract in the last mentioned case was made in Georgia during the rebellion, and the law against which it was protected was passed by the reorganized State government.

file their petition in the bank case, they were opposed by those depositors who had early appeared in the case, upon three grounds, the first and third of which were pressed upon, and ignored by, the court in the present case.

1. That the bills sought to be filed were barred by the statute of limitations of six years

2. That while the bank assignment of 1866 was void so far as it sought to exclude the claims that arose after May 6, 1861, from participation in the assets of the bank; yet that, Watson having held the assets under the assignment, and therefore adversely to those claiming against it, three years of such possession as to the personalty, and seven years as to the realty, had vested in him the title to the fund, according to the trusts of the assignment, except against those who came into the bank case (as those depositors had done) early enough to prevent the formation against them of the bar of these statutes of limitations.

3. That the charter of the bank having expired by its own limitation Jan. 1, 1868, and the five years of subsequent corporate existence given by statute for winding up purposes having expired Jan. 1, 1873, thereupon the old common law rule came into operation, whereby all the debts of the bank perished, except (the old common law rule, however, made no exceptions) those which had been filed in the case before the expiration of the five years.

This new contest was decided in the chancery court in favor of the new issue holders, and an appeal taken to the supreme court, where it was twice argued, the Attorney General appearing for the State against the new issue.

In January, 1877, the supreme court rendered its decision in favor of the new issue holders.

The court held:

1. That section 2779 of the Code of Tennessee exempted from the operations of statutes of limitations, all bills "*issued or put in circulation as money*,"—in which category stood the new issue.

2. That Watson had held the assets of the bank simply as the receiver of the chancery court for the benefit of whoever the court might ultimately determine to be entitled to participate in the distribution of the fund, and adversely to no one.

3. That upon the dissolution of the bank its assets continued

to be a trust fund for the benefit of its creditors, which fund the chancery court was bound to apply properly.

See the decree,—appendix, ps. 46 48.

These decisions of the State supreme court obviously placed the new issue upon the same footing with the old issue. The grounds suggested in *Furman* v. *Nichol* for a distinction between the two issues, having been thoroughly investigated, were negatived, together with all the other objections against the validity of the new issue that the strained ingenuity of every hostile interest could devise. It was now generally understood that the outrage inflicted upon the new issue by the misconceiving arbitrary constitutional amendment of 1865 had been at last repaired. Nobody now doubted that the new issue was, equally with the old issue, entitled to the benefit of the State's guaranty, applicable equally to every valid note issued by the bank, and attaching as an incident thereto, just as the benefit of a mortgage attaches to notes secured thereby, the holder being as indefeasibly entitled to the security as to the personal liability of the maker.

Upon the faith of the State's guaranty, the new issue, equally with the old issue, had been enabled to get into general circulation throughout the State. And while the fulfillment of this guaranty as to the new issue threatened a considerable addition to the burdens of the State, notwithstanding the reduction of the new issue far below its original volume,—by compromises in settlement of indebtedness due the bank where nothing else could be obtained, by accidents, and the mistake by which, owing to its close resemblance to old issue, a large quantity of new issue was burned as old issue,—this was being acquiesced in by all right minded men, when the very extraordinary decision now under review,—for such simple justice to our supreme court requires me to call it,—astonished the profession throughout the State.

* * * * * * *

The present case was commenced before the first hearing of the bank case in the supreme court, but was not pressed until shortly after the decision in that case, when it was brought to a hearing in the lower court, and immediately transferred by appeal to the supreme court, still sitting, where it was heard almost

at once, and, being decided adversely to the relator, was thereupon brought here by writ of error.

It was a proceeding by *mandamus*,—similar to that in *Furman* v. *Nichol*,—to compel the collector at Nashville to receive payment of the relator's State taxes in new issue of the Bank of Tennessee.

The petition and the alternative writ set forth the provision in the bank charter (section 12), that the notes of the bank should be receivable "by all tax collectors, and other public officers, in all payments for taxes, or other moneys due to the State."

Also, the tender of the notes by the relator, and its refusal by the collector, and that this refusal was in pursuance of instructions grounded upon the action of the State in the adoption of sec. 6 of the Schedule to the constitutional amendments of 1865, by which it was attempted to invalidate the new issue, under the mistaken impression that it was emitted in aid of the rebellion.

The notes tendered were alleged to have been issued in the ordinary business of the bank, and not in aid of the rebellion.

It was then set forth that sec. 6 of the Schedule, and the subsequent legislation in keeping therewith, were void as attempts, in defiance of sec. 10, Art. 1 of the Constitution of the United States, to impair the obligation of the State's pledge in sec. 12 of the bank charter, that the notes of the bank should be received by her collectors in payment of taxes.

The learned Attorney General of the State took charge of the defense, and alleged ten reasons why the suit ought not to be sustained.

1. The following provision of the Act of Feb. 28, 1873, entitled "An Act to Protect the State from Judgments:"—

> "That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority, to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds, or property; and all such suits, now pending or hereafter brought, shall be dismissed as to the State, or such officers, on motion, plea, or demurrer, of the law officer of the State, or counsel employed for the State."

2. The provisions of the Act of March 21, 1873, entitled, "An Act to Facilitate the Collection of Revenue."

Section 1 of this act provides, that when the tax payer disputes the legality of the tax demanded of him he shall, nevertheless,

pay it, but that he may protest against the exaction, and within thirty days thereafter sue the collector for the recovery of the money; and that,—

"if it be determined that the same was wrongfully collected, as not being due from said party to the State, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded; and thereupon the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims upon the treasury."

Section 2 provides that this shall be the only remedy for parties claiming the right to pay taxes in other funds than such as are demanded by the collectors.

3. That section 6 of the Schedule of 1865, and the legislation in pursuance thereof, had invalidated the new issue.

4. "That no such action lay at common law, to enforce action by an officer in defiance of the legislative command."

5. The statute of limitations of six years, the action of the State being relied upon as having set in motion the statute.

6. The same statute, the action of the bank being relied upon as having set it in motion.

7. The expiration, before the commencement of the *mandamus* proceeding, of the charter of the bank, and of the five subsequent years of corporate existence allowed by law for winding up purposes.

8. That the notes involved were issued in aid of the rebellion, and were, as to the State's paying them (by receiving them for taxes), under the ban of the XIVth amendment to the Constitution of the United States.

9. A mere general denial of the obligation of the State to receive the money for taxes.

10. The following provision of the Act of March 25, 1873, (Sec. 51):

"The several tax collectors shall receive in discharge of the taxes and other dues to the State, bank notes of the Bank of Tennessee known as old issue, warrants on the treasury legally outstanding, gold, silver, national bank notes, United States legal tender notes, *and nothing else.*"

The 4th response to the alternative writ is not to the purpose. True, at common law a mandamus could not compel official action in disregard of the legislative command. But why? Because the legislature known to the common law was an *omnipotent*

Parliament. But our State legislatures are *subordinate* to written constitutions, and legislative commands in conflict therewith are nullities, and must be ignored by the courts. So that, if the contract of a State give a right to certain official action, and subsequent, *unconstitutional*, legislative command forbid such action, the courts *must* disregard the void prohibition, and enforce the official action. *Board of Liquidation* v. *McComb*, 2 Otto, 541.

The 9th response,—a bald denial of the State's obligation,—merits no consideration.

Nor does the 8th response,—that the notes were issued in aid of the rebellion. This raises an issue of fact, which found no support in the record; which had previously been disposed of in the bank case, and the Jamison case; and which was negatived here by the silence of the State supreme court, which, had it been possible, would, of course, have grounded its adverse judgment, *irreversibly*, upon this decisive non-Federal basis, without the necessity of invoking the aid of any hostile State legislation to destroy the money.

The other seven responses resolve themselves into three:—

1. The hostile State legislation since the issue of the notes in question.

2. The statute of limitations.

3. The dissolution of the bank as a corporation.

The second and third of these defenses have, as already set forth, been settled by the recent decision of the Supreme Court of Tennessee, in the bank case.*

I come now to the State legislation since the issue of the notes in controversy.

The court below rested solely upon this the decision we complain of. This portion, therefore, of the original case, constitutes the case that is here for revision.

The following is a brief *resume* of all the legislation in question, in chronological order:

1. Sec. 6 of the Schedule to the constitutional amendments of 1865 attempted, *vi et armis*, to slay the new issue, denouncing it as "unconstitutional, null, and void," under the absurd misconception that it consisted of rebel State obligations incurred to supply the sinews of war against the Union. I need not waste

*See appendix, ps. 46–48, etc.

time on this. Besides, it was repealed by the Constitution of 1870, which revived whatever, if anything, was struck down by the Schedule of 1865. *Fuller* v. *McFarland*, 6 Heis., 81.

2. Sec. 33 of the act of June 10, 1865, repealed sec. 12 of the bank charter,—that obligating the State to receive the notes of the bank for taxes. But this could not affect the notes issued *before* 1865. *Furman* v. *Nichol*, 8 Wal., 44.

3. Sec. 34 of this act, repealed sec. 2807 of the Code, permitting suits against the State.

This act was really inapplicable. But the court below resorted to it as applicable, and converted it into an offending act, impairing the obligation of the State's contract, by taking away, as we shall see, the remedy to enforce it.

4. Sec. 3 of the act of Feb. 16, 1866, prohibited payment in new issue, of debts due the bank; and sec. 6 directed the assignment of the effects of the bank, "excluding all claims and demands of all kinds after the 6th of May, 1861, as absolutely null and void." This act could not do what was beyond the power of the constitutional amendment,—immolate, upon the altar of misguided, undiscriminating loyal zeal, the innocent new issue. This has been settled by the State supreme court in the bank case.

5. The act of Feb. 28, 1873, prohibited suits "against the State, or any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds, or property."

6. The act of March 21, 1873, took away all remedy from persons claiming to pay taxes in other funds than those demanded by the collectors.

This act first deals with the case where the legality of the tax is disputed. It requires payment, but allows the party, having protested, to sue the collector. The State promises, on the certificate of the court, to refund the money. The act then provides that this shall be the only remedy where the right is claimed to pay the tax in other funds than such as are demanded by the collector.

Evidently the draughtsman did not stop to think out the practical working of this. Was the party who claims the right to pay the tax—in new issue, for instance,—after payment under protest in the funds demanded, then really to sue to recover the *whole* of his payment? If he failed to recover he would get *no* relief.

If he recovered he would pay *no* tax. Any middle course is excluded. And if we may bend the act, by a liberal construction, into something somewhat less absurd, and suppose that the recovery, if any, was meant to be for the difference in value between the funds tendered and those exacted, yet such a recovery would not enforce the right upon the concession whereof alone can *any* recovery be claimed, viz., to have the very funds tendered received for taxes. Concede this right and yet allow the new issue holder only to recover for its violation the difference in value between the notes tendered and the funds exacted by the collector, and all that he can do with his new issue is to use a portion of it in making successive annual tenders, to serve as a basis for annual litigation. Every year would occur the tender; the refusal; the protest; the payment in the funds demanded; the suit; and the recovery of the difference in value between the funds tendered and those exacted. A handful of the money would do as well as a chest full. The same notes could be tendered year after year forever. Not a dollar of the money would ever get into the collector's wallet.

This act, then, cannot escape the ban of unconstitutionality, under the idea that it leaves the new issue holder a sufficient remedy. For it leaves him no remedy at all, to enforce his right, if he have any right,—to have his specific bills received for taxes.

And, then, such pretense of a remedy as the act gives, leaves the party dependent, at last, on the mere good faith of the State. For, after his recovery, the act of Feb. 28th, 1873, would prevent his *compelling* the Comptroller to issue the promised warrant for its payment, if the State should choose to forbid this, as she would be perfectly sure to do whenever further mismanagement should have deepened her financial embarrassment.

A *mandamus* against the collector is the *only* remedy that *can* enforce the right to have any given funds received for taxes. The new issue holder either has *this* remedy, or he has *no* remedy.

7. The act of March 25, 1873, provides what the collectors shall receive for taxes, to the exclusion of the new issue.

The decision of the court was placed upon two grounds.

First, That, conceding the State's obligation to receive for taxes the notes in question, it was not enforceable by *mandamus* against the collector.

Second, That there was no such obligation.

I.

To make out the first position, it was assumed that the proceeding against the collector was a suit against the State. Then the argument ran thus (par. 258, etc).

The State can be sued only by her consent. When she chartered the bank and agreed to receive its notes for taxes (1838), she had not consented to be sued. At that time, therefore, her obligation to receive these notes for taxes was not enforceable. It rested, like her obligation to pay her bonds, solely on her plighted faith.

In 1855, the State did consent to be sued, and she did not withdraw this consent until 1865, and the notes in question were issued in the meanwhile. But the State's consent to be sued, being a mere act of grace, was capable of being withdrawn at pleasure. It did not incorporate itself with her previous agreement—to receive the notes of the bank for taxes—so as to become a part of the contract embodied in the notes issued after 1855. So that the repeal of the act of 1855 (Code sec. 2807) was simply the withdrawal of a boon, and not the abrogation of a remedy so related to the State's contract—to receive the bank's notes for taxes—that to take away the remedy was to impair the obligation of the contract.

But the legislature did not stop at the repeal of the act of 1855, which authorized suits against the State. By chapter 13, acts 1873, it was enacted that "no court in the State has, or hereafter shall have, any power, jurisdiction, or authority, to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds, or property."

And by chapter 44, acts 1873, it was enacted that whenever any taxpayer conceives that the taxes demanded of him are unjust, or illegally demanded, his only remedy shall be to pay under protest and afterward to sue the collector. Also, that no officer of the State should be subjected to any suit for a refusal to receive in payment of revenue to the State any kind or description of funds other than such as he might be authorized and required to receive for the time being by law.

And by chapter 118, acts 1873, it was enacted that "tax collectors shall receive in discharge of taxes and other dues to the State, bank notes of the Bank of Tennessee known as old issue, warrants on the treasury legally out-standing, gold, silver, national bank notes, U. S. legal tender notes, *and nothing else*."

This legislation was sustained.

It was insisted, said that court, that these provisions impaired the obligation of the State's contract contained in sec. 12 of the bank's charter, inasmuch as they left the holder no remedy to compel the receipt of his notes by the collector for taxes. But the fallacy of this position consisted in the assumption that the holder had any such remedy *before* the passage of the acts of 1873. He had in fact had no such remedy since the act of 1865 withdrew the privilege of suing the State. But if *that* act had not withdrawn this privilege, the acts of 1873 would equally have sufficed to do so. The court added (par. 266):

"The case of *Williams* v. *The Register of W. Tenn.*, Cooke, 214, is conclusive of this question. In that case, an application was made for a *mandamus*, to compel a register to issue a grant, although the legislature had prohibited its issuance. It is said by the court, that to grant a *mandamus* in the case would in effect sanction the idea that the State may be sued. It was held, that the act of the legislature forbidding the issuance of the grant was void because of its repugnance to the Constitution, yet the court say they cannot perceive that they possess any physical power to compel the State to issue the grant. The reason was, that the disposition of the soil was an attribute of sovereignty belonging peculiarly to the legislature. So, in the present case, the providing of revenue of the State is an attribute of sovereignty, and by the Constitution the exercise of this attribute of sovereignty belongs to the legislature. That power has forbidden its revenue officers to receive the new issue in payment of taxes, and has withheld from the courts any jurisdiction to entertain a suit for refusal to receive such payment. It follows that, *even if the statutes forbidding the receipt of the new issue by the tax collectors were unconstitutional*, yet the common law court had no jurisdiction to compel its reception. Much less does such jurisdiction exist when the repeal of the act authorizing suits against the State and the forbidding of any suit against the collectors for refusing to receive it do not violate that provision of the Federal Constitution which protects the obligation of contracts from impairment by State legislation."

The first thing that will occur to your Honors here is that as to the point involved in the first branch of this decision,—that a *mandamus* will not lie to compel the receipt by the collector of the notes in question for State taxes even if the State's obligation so to receive them be conceded,—there is not even the pretence of any distinction between the present case and *Furman* v. *Nichol*,

which was likewise a *mandamus* suit, to compel the receipt of the bank's notes for taxes, and was commenced after the act of 1865 had withdrawn the State's consent to be sued, (in August 1866, 8 Wal., 47, 17th line from the top).

How was it that in that case the vexed ingenuity of the astute counsel of the State, aided by that of the State supreme court, proved unequal to the discovery, that to compel a collector to receive for taxes what the State had contracted that he should receive, would be to coerce sovereignty?

In the present case, the State supreme court slurred over this, merely remarking that in *Furman* v. *Nichol* "no question as to the jurisdiction of the State court was raised."

That no such question was raised in that great exigency is certainly very significant. It evinces that neither the able counsel of the State nor any of the learned judges of the State supreme court entertained the smallest doubt as to the jurisdiction.

Upon this branch of the case, the appellant complains that State legislation was permitted, in violation of sec. 10 Art. 1, Constitution of the United States, to impair the obligation of the State's contract in sec. 12 of the bank's charter, to the benefit of which the notes in controversy were entitled; the impairment consisting in depriving the notes of the only remedy capable of enforcing the contract, a *mandamus* to compel the collector to perform his duty, to receive the notes tendered him in payment of the appellant's taxes, as the State had stipulated that he should do.

The legislation of 1865, merely withdrawing the State's consent to be sued, was made to destroy the note holder's remedy, by the simple device of calling that remedy—a *mandamus* against the collector—a suit against the State, a mere privilege capable of being withdrawn at pleasure:—*not* a remedy.

The legislation of 1873, prohibiting the collector from receiving the notes in payment of taxes, and taking away all remedy to compel him so to receive them, was sustained, and it was held that *even if this legislation was unconstitutional*, yet it was effectual to destroy the remedy by *mandamus* against the collector.

However objectionable in other aspects, it was intimated that at any rate, this legislation was valid considered simply as legislation cumulatively withdrawing the State's consent to be sued.

In writs of error to State courts where, as here, the decision below was glaringly erroneous, the main contest of the appellee in this court is usually upon the question of jurisdiction. Accordingly, I address myself first to this point.

Upon the first branch of the case, it will doubtless be urged that the pith of the decision complained of is, that a *mandamus* to compel a collector to receive given funds for taxes is a suit against the State, and that this ruling does not involve a Federal question, as it does not give force to any objectionable State legislation, but merely declares a general principle.

This is a familiar line of argument in cases like the present.

Where a State supreme court inclines to countenance the State's attempt to impair the obligation of a contract, it does not with clumsy directness strike down the contract, or the remedy, with the offending legislation. It bases a decision the transparent *animus* of which is to give practical effect to the legislation, upon the imperfection of the contract; or, where it is sought to sap the contract by operating on the remedy, upon the precariousness of the remedy.

For example, in *Jefferson Branch Bank* v *Skelly*, 1 Black, 436, as in other previous cases, the State of Ohio, having first agreed to accept a percentage of the dividends of the bank in lieu of all other taxes, and then adopted a new constitution imposing taxes upon the bank, in violation of this agreement, the State supreme court held, not that the new constitution could override previous contracts, but that the State's agreement did not amount to a contract.

So, in *Furman* v *Nichol*, 8 Wal., 44, the State supreme court did not affirm that the repeal, in 1865, of sec. 12 of the charter of the Bank of Tennessee, had power to relieve the State of her contract therein contained, as against parties entitled to the benefit of that contract. But they limited the benefit of the contract, which ran with the notes, to holders of the notes who had become such before the repeal,—exercising their ingenuity upon the contract, not the legislation.

In *Bethel* v. *Demaret*, 10 Wal., 537; *Bank of W. Tenn.* v. *Citizens' Bank*, 14 Wal., 9; and *Stevenson* v. *Williams*, 19 Wal., 572, Confederate money contracts; and in *Palmer* v. *Marston*, 14 Wal., 10, a slave contract, were irreversibly overborne by the

adroitness of the Supreme Court of Louisiana; but in *Delmas* v. *Insurance Co.*, 14 Wal., 661, the same court incautiously placed a similar decision, not upon the absurd pretended general principles of the previous decisions, but upon an annulling constitution provision, whereupon this court now took jurisdiction, and not only overthrew the annulling constitutional provision, but refused to regard the previous preposterous State decisions.

I will hazard the remark in this connection, although the present case does not call for it, that it will probably at no distant day become necessary for this court to advance one step further, and to take jurisdiction in cases where an astute State supreme court shall have, as a device to elude its revision, insincerely based on general principles a decision the real motive and the effect of which were to give effect to legislation in conflict with the Constitution of the United States.

It constantly happens that the general Federal question,—Has the obligation of a contract been impaired by State legislation? evolves as its vital ingredient a minor question non-Federal in the abstract, but Federal through its relation to the general question which hinges upon it.

An instance of this is the case of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wal., 141.

The State of New Jersey had contracted in 1790 for a bridge across the Hackensack River, stipulating, in favor of the bridge proprietors, that no other bridge should be built across the river, within certain limits, for 99 years. Afterward, a railway viaduct was authorized within these limits. And the point on which the case turned in this court was, whether the viaduct was a "bridge" or not, within the meaning of the act of 1790.

So, the turning point of the Ohio bank cases was, whether certain phraseology amounted to a contract or not; and in *Furman* v. *Nichol* it was, whether the contract involved ran with the notes or not.

If the act complained of be in reality innocent, yet if the State supreme court construe it so as to make it impair the obligation of a contract, this court will give relief.

In the New Jersey bridge case the court said:

"It is said, however, that it not the validity of the act of 1860 which is complained of by the plaintiff, but the construction

placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court; and that this court will not be discharging its duty, to see that no State legislature shall pass a law impairing the obligation of contracts, unless it takes jurisdiction of such cases."

To the same effect, in *Insurance Co.* v. *The Treasurer*, 11 Wal., 208–9, the court said:

"If the State court gives such a construction to a State statute as to make it conflict with the Constitution or laws of the United State, and sustains its validity, after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute."

It is obvious that all of the questions which are involved in the question, whether the obligation of a contract has been impaired by State legislation—all the component parts of the Federal question—must be determined by this court for itself; such as, in *Jefferson Branch Bank* v. *Skelly*, whether sec. 60 of the bank charter was a contract or not; in *Furman* v. *Nichol*, whether the contract was one running with the notes or not; and in *Bridge Proprietors* v. *Hoboken Co.*, whether the structure complained of was a "bridge" or not. For, in the language of the court in *Delmas* v. *Insurance Co.*, 14 Wal., 668, (in regard to the question there, of contract or no contract): "If it were not so, the constitutional provision could always be evaded, by the State courts giving such a construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional legislation."

The court here cited *Jefferson Branch Bank* v. *Skelly*, 1 Black, 443, where it was said:

"Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States;

and that it should be enforced, notwithstanding a contrary conclusion by the supreme court of a State."

Now, in the first branch of the present case, the general Federal question is, Has State legislation been made unconstitutionally to deprive the appellant of his remedy against the collector?

The legislation of 1865 and that of 1873 have been so construed and applied as to destroy the remedy; or, rather, the remedy itself has been judicially so transformed into something that it was not, as to make this legislation fatal to it.

The legislation of 1865 simply withdrew the State's consent to be sued. The legislation of 1873 was viewed merely as cumulative of that of 1865. Then, in order to make this legislation tell upon the remedy against the collector, the court thrust this remedy into the category of suits against the State. Just as in the Ohio bank cases the State court attempted to enable the new State constitution to annul the contracts involved, by the process of deciding them not to be contracts; just as in *Furman* v. *Nichol* the State court attempted to make the offending legislation effectual, by limiting the scope of the contracts involved; so here the device was, to enable the State legislation to destroy the note holder's remedy, by deciding it *not* to be a remedy, but something which the legislation might validly withdraw,—a suit against the State, a mere privilege, a boon.

It is obvious, that whether or not the legislation in question has been made to impair the obligation of the State's contract as to the notes involved, depends upon whether the *mandamus* against the collector, which the court decided to have been prohibited by the legislation, was a suit against the State, or was a remedy proper, incorporated with the State's contract.

So that the very turning point of the Federal question upon the first branch of the case, is, Whether the *mandamus* against the collector was really a suit against the State.

The jurisdiction of this court is therefore clear.

Now as to the merits. There is no plausibility whatever in the suggestion that the *mandamus* against the collector, which confessedly existed in 1861, when the notes in question were issued, depended upon the act of 1855, allowing the State to be sued. Here is this act,—Code 2807:

"Actions may be instituted against the State under the same rules and regulations that govern actions between private persons, process being served upon the district attorney of the district in which the suit is commenced."

In his "History of a Lawsuit,"—a sort of bible of local practice with us—Judge Caruthers, a high authority, indicated that he had no idea that this act contemplated anything else than a direct proceeding against the State.

In section 17, his only comment was:

"If you sue the State, the command is, 'Summon the State of Tennessee,' which the sheriff obeys by summoning the attorney general of the district in which the suit is brought (Code, 2807)."

The *mandamus* has been a familiar remedy to our jurisprudence from before the Bank of Tennessee was incorporated, in 1838, down to the present time.

See Car. & Nich. Statutes, p. 448, where the act of 1831, regulating the proceedings, is set forth. I quote the first two sections:

"SEC. 1. The circuit judges of this State shall have power to issue writs of *mandamus*, upon petition, supported by affidavit before any judge, justice of the peace, or clerk of any circuit court, under the same rules, regulations, and restrictions, as in cases of injunctions, or *certiorari* and *supersedeas*.

"SEC. 2. The writ shall be made returnable to the circuit court of the county where the land lies, in all cases where land is the subject of controversy; and, in all other cases, to the circuit court of the county where the defendant, or defendants, in the writ may reside; or, if against a public officer, in the county in which his office is kept."

As to the remedy's attaching itself to the State's contract in sec. 12 of the bank charter, I need quote only the language of this court in *Walker* v. *Whitehead*, 16 Wal., 317:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into, and form a part of, it. This embraces alike those which affect its validity, construction, discharge, and *enforcement*. Nothing is more material to the obligation of a contract than the means of its enforcement. *The ideas of validity and remedy are inseparable;* and both are parts of the obligation which is guaranteed by the Constitution. The obligation of a contract is the law which binds the parties to perform their agreement."

The stipulation of the State, contained in sec. 12 of the bank's charter, that her collectors should receive the bank's notes in

payment of taxes, made it their duty so to receive these notes. Subsequent enactments to the contrary were merely nugatory. The duty of the collectors remained unaffected. If they refused to perform their duty, under whatever pretence, they were of course compellable to perform it, and compellable by *mandamus*.

If the State of Tennessee should now compromise her large indebtedness at 50 per cent., giving her creditors new bonds, expressing on their face, as a part of the contract, that the collectors should always be compellable by *mandamus* to receive them for taxes, no lawyer would, I think, question the right of a holder of such bonds to a *mandamus*, to compel a collector to receive them for taxes, even if the Legislature, with punic faith, should subsequently have undertaken to prohibit the collectors from receiving them in conformity with the State's contract.

Yet, that case would not really be any stronger than the present. The only difference would be, that in this case the law implies what in that would be made explicit.

In the present case, the State's contract in section 12 of the bank charter, together with a stipulation that the remedy for its enforcement existing at the time when the contract was made,—the *mandamus* against the collector,—should attach thereto, as a part of the contract, may be regarded as virtually endorsed on every valid note of the bank.

Nor before this case arose, with its stimulating exigencies, was it imagined that to compel the collector to receive for State taxes what the law had made so receivable, would be to coerce sovereignty.

The act of 1873 prohibited any injunction, *supersedeas*, etc., delaying the collection of taxes. Why pass such an act, if, without it, the courts, since the act of 1865, withdrawing the State's consent to be sued, could take no jurisdiction in such cases?

But if it be inadmissible to argue from the implication in the passage of the act of 1873, after the act of 1865, judicial decisions to the point are at hand.

In *Speers* v. *Lovigne*, 6 Cold., 421, the suit was commenced in 1868—three years after the State ceased to allow herself to be sued—to restrain the county clerk from collecting from the petitioner State and county taxes of the kind involved in *Furman* v. *Nichol*, of which the county clerk is the collector, and the

State supreme court declared that the writ of *certiorari* was the proper remedy, and granted relief, and did not dream that they were outraging the sovereignty of the State.

But we need not go so far back as this. In *Friedman* v. *Mathes*, 8 Heis., 488, decided in 1872, the suit was by *certiorari* and *supersedeas* against the collector of State and county taxes for Shelby county. In view of the doctrine of the present case, that the proceeding against the collector is a suit against the State, the following extract from the opinion of the court (p. 500) reads strangely:

"The act of 1867-8, ch. 79, s. 16, is relied on by the defendant (the collector), to defeat the remedy by *certiorari*. That section provides that no injunction, or petition for *mandamus* shall be granted by any judge or court in this State, or any bill or or petition for *mandamus*, alleging the illegality or unconstitutionality of any of the revenue laws of this State, restraining any officer charged with the collection of the public taxes of the State, except upon a final hearing of any cause in the court of last resort, if an appeal should be taken to that court.

"*This extraordinary statute is the legitimate bantling of revolutionary times, and in a few brief words assumes judicial powers for the Legislature, and closes the courts of justice against the people.*"

Why such an outcry against this, as an extreme act, when, without the act, the *mandamus* and injunction suits it restricts (not absolutely prohibits) would have been inadmissible, as suits against the State?

Why inveigh against the statute for closing the courts against the people, when the courts, if open, would have had no jurisdiction?

In this case, the court granted relief, quashing the assessments complained of, citing *Spears* v. *League*, 6 Col., 420, not yet having acquired due reverence for the immunities of sovereignty.

In *Louisville and Nashville Railroad Co.* v. *The State, etc.*, 8 Heisk., 805, decided in April, 1875, *only a few days before the present case*, the act of 1873 was assailed, because, fiercer than the revolutionary bantling of 1867, it took away even the *certiorari*, viewed in *Friedman* v. *Mathes* as "one of the great writs of right of which the people of this State could not be deprived," but denied by the self-same judge in the subsequent case (p. 806);

and it is inconceivable, that, if the court *then* supposed that even without the assailed act, the proceeding before them would, as a suit against the State, have been inadmissible, some intimation of this view should not have been given out. Yet we find none. See pp. 805–6.

The decisions of this court are conclusive upon this point.

The case of *Osborn* v. *The Bank of the United States*, 9 Wheaton, 738, is precisely in point here.

In this case, the U. S. circuit court had enjoined the revenue officer of the State of Ohio from collecting a tax assessed against this bank; and it was urged that this was in essence enjoining the *State*, which could not be sued in the circuit court.

It is, of course, too plain for controversy, that if an injunction restraining a revenue officer from collecting *any* tax at all is not an outrage upon sovereignty, *a fortiori*, a *mandamus* is not which compels him to receive in collection a given kind of funds,—in which case, the State obtains at least something.

A *mandamus* is but an affirmative injunction, "Thou shalt" no more constrains sovereignty than "thou shalt not."

I quote the synopsis of the decision in *Osborn* v. *The Bank of the United States*, given by the court in *Davis* v. *Gray*, 16 Wal., p. 220:

"In *Osborn* v. *The Bank of the United States*, three things, among others, were decided:

"(1) A circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2) Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

"(3) In deciding who are parties to the suit, the court will not look beyond the record. *Making a State officer a party, does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.*"

To the same effect are there cited, *State Bank of Ohio* v. *Knoop*, 16 How., 369; *Ohio Life and Trust Co.* v. *Debolt*, Ib., 432; *Dodge* v. *Woolsey*, 18 How., 331; *Mechanics' and Traders' Bank* v. *Debolt*, Ib., 380: and *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436.

Some of these cases came to this court from the U. S. circuit court, and some from the State supreme court. The State of Ohio struggled hard for the sovereign privilege of repudiating her pledges without constraint; but she struggled ineffectually.

In the case of *Polack* v. *Mansfield*, 44 Cal., 36, an action of ejectment was sustained against an army officer occupying the land in controversy for the purposes of a fortification, under the authority of the Secretary of War, and of the President.

In *Jackson* v. *Wilcox*, 1 Scam., 344, a similar action was sustained for the recovery of the premises on which Fort Dearborn was situated, which were occupied by the defendant as an officer of the army with his command.

The case was brought here; see 13 Pet., 498.

Grisar v. *McDowell*, 6 Wal., 370, was a similar action, the defendant being the commander of the military department of California, and occupying the premises in controversy as part of the public property of the United States, reserved for military purposes.

In these ejectment cases, the officers sued had even less interest than a revenue collector usually has in a suit to restrain the collection of a tax, for which he receives a small commision at least.

The controversy in each one of these cases was between the plaintiff claiming the land and the Government of the United States.

But that did not turn the actions into suits against the United States.

I will cite additionally but the recent case of *Board of Liquidation* v. *McComb*, 2 Otto, 531, which must have made our supreme court gasp for breath.

Here, the Legislature of Louisiana had directed the State Board of Liquidation, consisting of the Governor and other high State officers, to issue certain of the consolidated bonds of the State in violation of the scheme upon which the Board had originally been authorized to issue these bonds, up to $15,000,000, in

liquidation, at sixty per cent, of certain indebtedness of the State, and it was held that, at the instance of one of the non-resident holders of the consolidated bonds, who had submitted to have his debt scaled upon the faith of the scheme, the U. S. circuit court had jurisdiction to restrain the Board from complying with the unconstitutional mandate of the Legislature.

I quote the language of the court upon the point of jurisdiction:

"In our judgment, therefore, the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such a process.

"On this branch of the subject, the numerous and well considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal, may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. *In either case, if the officer plead the authority of an unconstitutional law, for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated as null and void.*" Citing *Osborn* v. *Bank of the United States*, 9 Wh., 859, and *Davis* v. *Gray*, 16 Wal., 220.

The obsolete old case of *Williams* v. *The Register of W. Tenn.*, Cooke, 214, decided in 1812, was dug up by the State supreme court and made to figure in this branch of the present case. It

is not to the point, and if it were it was erroneously decided. The decision was placed upon two points; the nature of the subject matter involved—the disposition of the sacred soil of a sovereign State;—and the effect of an unconstitutional act. As to the latter, there was a misconception which,—so accustomed have courts become to dealing with such acts since that early day,—would hardly be possible anywhere now.

Williams had purchased a portion of a land warrant, and taken the steps to entitle him to a grant, but the Legislature had forbidden the Register to issue the grant. The proceeding was a *mandamus* to compel him to do so. The relief was refused.

The confused notions of the court will best be appreciated by quoting from the opinion:

"That Williams gave a valuable consideration is not disputed; the assignment from Dillon is set out, his entry and survey are regular, and but for the act of 1809 no one can doubt but that the register should have issued him a grant. . . . . .

"That the petitioner acquired a vested right by purchase of a part of the warrant of Dillon we have no doubt, and that he cannot be deprived of this right by any subsequent legislative act is equally clear. The court have no hesitancy in saying that where the rights of *two individuals* are in judicial conflict, any act of the Legislature concerning them obviously repugnant to the Constitution is void. But this is not that case. . . . . .

"The obligation contracted by the State to issue a grant or grants to Dillon or his assignee, we have no doubt the State is morally bound to comply with; but does the Constitution, or the nature of our government, furnish the means to the judicial department to compel an observance of this contract, in issuing a grant when the State has expressly said it will not issue one?

"The State has, by its act of 1809, prohibited its officers from issuing a grant or grants on this warrant. . . . . .

"In all States, the disposition of the soil is an attribute of sovereignty, and emanates *immediately* from that source. Political considerations may interfere to prevent a State temporarily from discharging a moral obligation. . . . .

"The court cannot but perceive that to grant a *mandamus* in this case would in effect sanction the idea that the State may be sued; and then this writ would be resorted to as the appropriate means of redress. On general principles, the idea of an individual citizen or subject compelling the sovereign to do an act, is repugnant to every idea of sovereignty. . . . Suppose the State indebted to an individual, this court could not grant a *mandamus* compelling the treasurer to pay it.

"The Legislature has forbidden its officers to issue a grant. Every act respecting the disposition of the soil is an act of sovereignty; with the Legislature, where this power resides, it must remain as to its exercise.

"It is the province of the judicial department to determine *between man and man; and not between the State and its citizens*, where there is no vested, perfect

right to a grant, either legal or equitable. There is consequently *but one party before us* . . . . . .

"It is not material to inquire in what respects an entry is a legal or an equitable claim to land. To some purposes, it may possess legal attributes; in general, however, it must be considered as affording an equitable right. . . .

"With the view we now possess of this subject, the act of 1809 seems to be void on account of its repugnance to the Constitution; but this court cannot perceive that it possesses any *physical power to compel the State to issue a grant.* Should any *individual* hereafter endeavor to avail himself of that act, by seating himself on the land, or obtaining a title, a court of equity cannot refuse redress, on the case being properly represented.

"To obtain such a writ (the writ of *mandamus*), the party applying must show that he has a *legal* right, and that he has no other legal specific remedy. In this case, the petitioner *has not a legal right*,—he cannot have that *until the Legislature repeal the prohibitory act.*"

The Court declared the act of 1809 unconstitutional, but they supposed that the purport of this was, merely that it could not impair the petitioner's right to the *land*. They said that if the Legislature undertook to vest the title in any one else, a court of equity would interpose as against him, to protect the petitioner's right. But they gave the act a partial effect. They considered that it had taken away the Register's power to issue and the petitioner's "legal" right to have issued, the *grant*. They failed to see that the act, if unconstitutional (as clearly it was), was just as ineffectual to impair the right to the *grant* as the right to the land.

If the Register's power to issue the grant was withdrawn, then, even if the petitioner's right to it was unimpaired, yet, as there was no officer with power to issue it, the grant could be obtained only by coercing the *State* to issue it. So that the *mandamus*, the Register's power being gone, naturally seemed to the court an attempt to coerce the State. They compared the case to that of a creditor of the State attempting by *mandamus* to compel the treasurer to pay his claim.

The holder of a past due State bond could not by *mandamus* compel the treasurer to pay it. But if it were a part of the contract expressed in the bond, that it should be the duty of the treasurer to pay it on presentation, then he *could* be compelled by *mandamus* to do so. And in *that* case, if the Legislature subsequently forbade the payment, the act would not relieve the treasurer of the duty, but would simply be a nullity, and the court

would be bound to ignore it, and to compel the treasurer to pay just as if it had not been passed.

This is clearer now than it was in 1812, not because the theory of the relation of the courts to the legislatures has changed; but because, in the progress of opinion, the courts stand higher now relatively to the legislatures than they did in 1812.

In *Marbury* v. *Madison*, 1 Cranch, 177, in 1803, C. J. Marshall thought it worth while to demonstrate elaborately that an unconstitutional act was really void. But it has now become an every day matter judicially to annul unconstitutional acts; and the legislatures have, in fact, become careless, because they rely upon the courts to prevent any harm from their overstepping constitutional boundaries. Hence the tone of the courts now is bolder and more positive.

In the case last cited, the stress was laid upon the peculiar nature of the matter involved. The court said that "the disposition of the soil is an *attribute of sovereignty*, and emanates *immediately* from the source." They added: "*Every act* respecting the disposition of the soil is *an act of sovereignty*; with the *Legislature*, where this power resides, it must remain."

The disposition of the soil being "an attribute of sovereignty," and *every act* respecting it being an "an act of sovereignty," the issue of a grant was then an act of sovereignty, and to compel this was to compel an act of sovereignty; that is, to coerce sovereignty.

But while it is an attribute of sovereignty to levy taxes, it certainly has not been supposed that every act respecting their assessment and collection is an act of sovereignty.

Taxes are collected by ministerial officers, who must proceed according to law (not necessarily according to the will of the Legislature, but according to law), and who are amenable to the courts if they transgress, or fail to comply with, the law. And it is a novel doctrine, that to take jurisdiction of such cases is to trespass upon the immunities of sovereignty.

I have already pointed out that the recent decisions of our supreme court, themselves, repel any such nonsense as this. (*Ante*, ps. 27-29.) Why was not *Williams* v. *The Register of W. Tenn.* resurrected before?

The substance of the matter is, that when the notes in contro-

versy were issued, they were entitled to the benefit of the remedy by *mandamus*, to compel the collector to receive them for taxes due the State. They were entitled to this remedy, not by virtue of the act of 1855, by which the State agreed to be sued, but because the remedy became incorporated with the State's contract in sec. 12 of the bank's charter, enacted in 1838, being a remedy conferred by the laws existing at the time and place of the making of the contract and where it was to be performed, which laws, including alike those affecting its validity, construction, discharge, and enforcement, entered into, and formed a part of, the State's contract. And it was incompetent afterward to take away this remedy, either by squarely enforcing destructive legislation undisguisedly leveled at it, or by the insidious process of judicially transforming the remedy into something which other legislation, innocent in itself, might be competent to destroy. In either case, State legislation is made to impair the obligation of the contract, by depriving it of its remedy.

II.

Upon the second branch of the case, the court below, not satisfied with destroying the remedy of the new issue holders, proceeded to decide away the State's obligation to receive the notes for taxes, holding that the legislation of the restored State government had validly repudiated this obligation.

The court had recently in the bank case, after all the interests hostile to the new issue had done their utmost against it, been unable to take any distinction between the notes issued before and those issued after May 6, 1861. All were held equally valid, and equally entitled to priority out of the assets of the bank. The new issue figured there as claims against the bank. The court delivered to the note holders the lean carcass of the bank.

But, by sec. 12 of the bank charter, the State had agreed, in 1838, to receive for taxes all valid notes issued by the bank; and the new issue being pronounced perfectly valid, the holders of it were advised that they were, as a matter of course, entitled to the benefit of the State's guaranty.

The holder of a note takes the benefit of the security as he takes the note, *Carpenter* v. *Longan*, 16 Wal., 271; *Kenicott* v. *Supervisors*, ib., 452; *Logen* v. *Smith*, Sup. Court of Mo., 1876.

The State had just finished digesting the old issue, administered

to her by *Furman* v. *Nichol*, and she shuddered at the prospect of another similar dose. But there was no help for it, unless some distinction, not even conceived of in the bank case, could be conjured up against the new issue. The field having been exhausted in every other direction, there was nothing left but to deny the identity of the State's guaranty as applicable to the old issue and to the new issue. The annals of jurisprudence furnish nothing more far fetched than this lame attempt.

The only imaginable difference between the old issue and the new issue, was that the new issue was emitted after May 6, 1861. So *this* had to be the foundation of the distinction necessary to put the new issue outside of *Furman* v. *Nichol*. The State's guaranty had been given in 1838. But as to the new issue it must somehow be turned into the act of the rebel State government.

The court said:

"We are to regard the 12th section of the bank charter as having been *reenacted, or tacitly recognized as in force, by the new government inaugurated in* 1861. It was therefore an attempt by the usurping government to bind the State to guaranty the notes of the bank issued during the existence of the new government, by agreeing to receive them for taxes assessed to support the usurping government."

The court then proceeded to declare that this guaranty, made by the reenactment or tacit recognition of the "usurping government," in 1861, was "*not under the protection of the Federal Constitution*," and that it was therefore competent for the legislation of the restored State government "to *repudiate* the alleged contract, and to *refuse to receive the notes* in payment of taxes assessed to support the legitimate State government."

The opinion thus stated the question upon this branch of the case; par. 272:

"The question presents itself, was the contract of guaranty between the State and the holders of the new issue, arising under sec. 12 of the bank charter, under the protection of the Federal Constitution during the rebellion. If so, then the act of the legislature repudiating that issue was invalid. If not, then that act was legitimate and effective."

It wound up thus; par. 275:

"Although the notes issued by the bank might be binding as between the *bank* and the holders thereof, they could not be made the basis of a contract between the *State* and the holders thereof, by which the State would be bound to receive

them for taxes due the State after the usurped government should cease to exist, and the legitimate government should be restored. It follows, that because the contract arising under the 12th section of the bank charter during the existence of the usurped State government was *not under the protection of the Federal Constitution*, it was competent for the legislature of the restored State government to repudiate the alleged contract, and to refuse to receive the notes in payment of taxes assessed to support the restored State government.

"The legislature of the usurping government had no power, by reenacting the 12th section of the bank charter, to impose upon the State an obligation which the legislature of the restored, legitimate State government would be bound to carry out." (par 269—275.)

How came sec. 12 to require a reenactment in 1861? The court itself said:

"The laws which had prevailed before the attempted revolution, so far as they were not expressly repealed or changed by the legislature of the *de facto* government, *continued in force* as between the citizens of the new government:" adding:—"In this way, the charter of the bank *continued in force*, and its transactions as a banking corporation were valid and binding as between the bank and those dealing with it. Its capacity to receive deposits and to issue a circulation, was the same after as before the inauguration of the new government."

How came just one section of the charter to drop out, so as to need a reenactment?

One of the most important functions of the bank in 1861, as at all times during its existence, was to "issue a circulation." The court said that its capacity to do this "was the same after, as before the inauguration of the new government."

But it was the bank's power, under section 12, to impress upon its notes receivability for State taxes, that constituted a large part of its capacity "to issue a circulation." Had it been even dreamed of, that the continuance of this quality, as to the notes issued after May 6, 1861, depended upon the permanence of the State government of 1861, the capacity of the bank "to issue a circulation" would by no manner of means have been "the same after as before the inauguration of the new government." What prudent man would then have felt confidence in the notes?

The rebellion, of itself, did not repeal any statute. The rebel legislature did not repeal sec. 12. Without repealing it, how could they reenact it, so as to make it stand upon their reenactment?

They did not reenact it; but if they had, this would have been an idle thing: the section would still have stood upon its original basis,—unaffected by the superfluous reenactment.

But the court did not even require a reenactment. The language used was,—"reenacted or *tacitly recognized* by the new government." Their mere tacit recognition, then, was sufficient to make the section *their* act. But the only possible evidence of their tacit recognition of the section was their refraining from repealing it. A legislature, then, is to be credited with all the laws it fails to repeal. In other words, not to destroy is to create.

Why was this novel doctrine not advanced in the case of *State* v. *Stoll*, 17 Wal., 425? This, also, was a *mandamus*, to compel a collector to receive for taxes notes of a State bank,—the Bank of the State of South Carolina,—notes issued, too, after the State had plunged into the rebellion (p. 429, at bottom). The constitution of this bank was substantially precisely similar to that of the Bank of Tennessee. Section 16 of the charter of the former was, *verbatim et literatim et punctuatim*, identical with section 12 of the charter of the latter. The point lay right on the surface, and had there been anything in it, it would, in a case of that importance,—being included in the Federal question,—have been noticed by this court, under the last clause of Rule 21. § 8, even if not assigned.

But it is a waste of time to undertake to refute seriously such an absurdity.

And then, even if conceded, it would not yield the desired conclusion.

The mere fact that a contract of the State was made during the rebellion, did not, if this were all that could be said against it, place it at the mercy of the reorganized State government. If the contract was originally invalid, no legislation of that government was necessary to repudiate it. If it was originally valid, no such legislation *could* repudiate it. No valid contract made in Tennessee at any time was ever outside of the protection of sec. 10, Article 1, of the Constitution of the United States.

Was not, then, the State government of 1861 capable of binding the State to an innocent undertaking?

Suppose that this government had chartered a theological seminary, and issued, to aid in its erection, $5000 of the bonds of the State, receivable on their face for taxes; could the restored State government have repudiated these bonds? Or, if, in the charter, the property of the institution had been exempted from taxation, could the restored State government have repudiated this exemption?

During the entire period of the emission of the new issue, (except the $177,000 issued after the removal of the assets of the bank south,—none of which is here involved)—the year 1861—there was no other State government, or *soi disant* State government, in Tennessee, than what the court termed, the rebel, military, *de facto* State government. The U. S. Military Governor was not appointed until 1862. Then, for the first time, there were conflicting State governments in Tennessee.

The rebellion made no *hiatus* in 1861 in the *State* government. There was no attempt to change that. Not a single State office was remodeled. Not a single State officer was removed. Every thing internal went on just as before; the same Governor, Legislature, Judiciary; the same justices, sheriffs, clerks, constables, registers, etc., etc., discharging the self-same functions precisely as before.

The attempt was to set up a new *central* government. That being a failure, its offices of government, of every description, must be regarded as having been utterly spurious. For a *de facto* officer presupposes a legal office. Merely the incumbent is irregularly in it. "The Confederate States" was simply organized treason.

But the States were "indestructible" legal existences. *Their* offices were *de jure*, even if their officers were but *de facto*. The attempt to create new *Central* arrangements did not vitiate the previous *State* arrangements.

True, the State governments were temporarily operated in the interest of the new usurping central government, and their action in this regard was void, and all who contributed thus to operate the State machinery, were criminally punishable. But they did not thereby, *ipso facto*, lose their official character.

Nor did their guilty acts which were void taint their innocent acts which were valid.

In *Huntington* v. *Texas*, 16 Wal., 413, it was settled that the rebel State government of Texas had power to aliene, for legitimate purposes, the property of the State.

In *Horn* v. *Lockhart*, 17 Wal., 571, it was held that the acts of the rebel States during the rebellion, and of their different departments of government, legislative, executive, and judicial, so far as they did not tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, were valid and binding.

"It is only," said the court, in *Spratt* v. *The United States*, 20 Wal., 464, "when, in the use of these powers, substantial aid and comfort was given, or intended to be given, to the rebellion; when the functions necessarily reposed in the State for the maintenance of civil society, were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void."

This was repeated in *The United States* v. *Insurance Companies*, 22 Wal., 102.

In *White* v. *Cannon*, 6 Wal., 443, the action of the Supreme Court of Louisiana, after the secession, was held valid. If judicial officers might act validly after rebellion, so likewise, of course, might the officers of the other two departments of government.

In *City of Richmond* v. *Smith*, 15 Wal. 429, the loyal city government was held liable for the *tort* of the previous rebel city government. If a rebel city government might entail its *torts* upon its loyal successor, why might not a rebel State government its innocent contracts?

See *The Sequestration Cases*, 30 Texas, 700: also, *Pepin* v. *Lochenmeyer*, 45 N. Y., 29.

So that, even with the impossible concession, that sec. 12 of the bank charter was operative after May 6, 1861, only through its reenactment by the then State government, the desired conclusion could not be reached. For the contracts of the State in 1861, untainted by the rebellion, were just as valid, and as well entitled to the guaranty of the Constitution against subsequent repudiation, as if there had been no rebellion at the time they were made.

The attempt of the court below, upon this branch of the

case also, as well as the first branch, falls into the same category with the attempt of the Ohio supreme court in the bank tax cases already referred too. There, contracts were decided not to have been contracts; this in order to enable the new State constitution to repudiate them. Here, the contract involved was decided to have been only a precarious contract, outside of the protection of sec. 10, Art. 1, Constitution of the United States; this in order to enable the legislation of the restored State government to repudiate it.

In both instances alike, justice was sacrificed upon the altar of State expediency.

We come here for redress, where, high above the smoke and mist of local passion and prejudice, and the din of popular clamor,—dimming the eyes and deafening the ears of justice,—the Constitution sits enthroned, with its guaranties against State violence and injustice, which have been well termed a bill of rights for the people of all the States.

J. M. P. Smith,
Counsel of Appellant.

APPENDIX.

THE STATE OF TENNESSEE *et al.*

vs.

THE BANK OF TENNESSEE *et al.*

This cause was heard on this ——— day of April, 1875, and upon a former day of the term, before the Honorable Supreme Court of Tennessee, sitting at Nashville upon a transcript of the record from the chancery court at Nashville, and upon argument of counsel. Whereupon, it appeared to the court that the original bill was filed in this cause by the State of Tennessee, and Samuel Watson, trustee of the Bank of Tennessee, against the President and Directors of the Bank of Tennessee, a corporation chartered by the General Assembly of the State of Tennessee, William G. Brownlow, Governor; A. J. Fletcher, Secretary of State; S. W. Hatchett, Comptroller of said State; and various individuals named as creditors of said bank; and praying that publication be made according to law for all other persons "claiming now, or hereafter claiming, to be creditors of said bank, and who will not come in and become parties complainant to this bill, be made parties defendant, and required to file : is, her, or its claim, in full, giving its origin and consideration, and when and how it arose, and when said parties became owners thereof, and creditors of the bank." The bill further prayed, that an injunction might issue enjoining all persons or corporations from suing out any writ against said bank or its trustee, either original, intermediate, or final, or commencing any legal proceedings whatever against either, in any court of law or equity in the State of Tennessee or elsewhere; and, upon final hearing, that all proper and necessary accounts be taken and ordered of the trust funds or the proceeds, and between said bank and trustees, or between the school fund and said bank, and between said bank and its creditors, and the amount of its indebtedness ascertained; and, if necessary, a rate bill be declared, and said trust be closed up under the decrees and orders of the court, according to the uses and trusts of the deed of assignment made by the bank and acts of the Legislature directing the assignment to be made.

It further appeared, that said bank was chartered by the Legislature of this State on the 26th of January, 1838, and continued to do a banking business down to, and after, the commencement of the late war; but on the 16th day of February, 1866, said Legislature passed an act, entitled "An Act to Wind up and Settle the Business of the Bank of Tennessee," which directed, among other things, that said bank should go into a state of liquidation; and, for that purpose, that the president and directors of said bank should cause an assignment and deed of trust of all the assets of said bank and branches, and property of all kinds, real, personal and mixed, to be made in the name of said bank, in trust

to secure, first, the full sum of $1,500,000,—the amount of the common school fund deposited in the Bank of Tennessee by act of the Legislature, which should be a preferred claim, with interest on said sum from the 6th of May, 1861,—and $618,250 of United States seven-thirty bonds, into which the coin of the bank, that was on hand when the war closed, had been converted by officers of the State, acting under a resolution of the General Assembly, were directed to be retained and placed in the hands of the Treasurer of the State of Tennessee, as a part of the common school fund. Secondly, after said school fund, with interest as above, was fully secured to the State, the remainder of all the assets, real, personal, or mixed, were to be assigned for distribution *pro rata* to secure all remaining creditors of all kinds, excluding all claims and demands of all kinds after May 6, 1861, as absolutely null and void.

It further appeared, that the president and directors of said bank did, on the 4th of May, 1866, in obedience to said act, make, execute, and cause to be probated and registered, an assignment to complainant Samuel Watson, trustee, of all the property and assets, real, personal, or mixed, together with said sum of $618,250 of United States seven-thirty bonds, for the uses and trusts as declared in said act and herein before recited. The said Watson accepted the trust, but did not give the bond required by the Code, because of its magnitude; and thereupon, the original bill was filed to have the trust executed by the chancery court, and the said Watson was appointed receiver and acting trustee, and gave bond to perform the orders and decrees of the court in the cause.

Mark R. Cockrill answered, claiming to be a creditor of the bank as a depositor, and then filed a cross bill on behalf of himself and such other depositors as might come in and have themselves made parties to it. He attacked the validity of said act of the Legislature passed on the 16th of February, 1866, and the assignment made under it, so far as they attempted to give a preference to the school fund over the creditors of the bank, and to exclude all claims and demands of all kinds after May 6, 1861. This cross bill was demurred to by the "board of commissioners of the common school fund," and by S. Watson, trustee; the demurrers were sustained by the Chancellor, and Cockrill appealed to this court.

B. R. McKinney and others, claiming to be depositors to the amount of $120,000, filed their answer and cross bill, also attacking the validity of the preference in favor of the school fund, and, in addition, praying for relief against the State as to $5,000,000 of bonds of the State, known as war bonds, purchased by the bank; and also for the failure of the State to furnish capital to the bank to the amount of $5,000,000, alleging that the State only furnished $3,600,000, and is now liable to make up the deficiency. Demurrers were filed by the defendants to this cross bill, insisting on the validity of the act of the Legislature, and of the assignment, and that complainants, in the cross bill, have no right to make the State a party defendant for the purposes stated in the cross bill. The demurrers were overruled, and the State and Watson appealed; but the appeal was afterward set aside, and then the State, by her counsel, dismissed the original bill as to the State, which was allowed by the Chancellor. From this decree, dismissing the original bill as to the State, the complainants in the cross bill appealed; and Watson, the trustee, also appealed from the decree overruling his demurrer to the cross bill.

T. A. Atchison and William M. Duncan filed their answer to the original bill,

claiming to be the owners and holders of a large amount of notes and post notes issued by said bank after May 6, 1861, and known as "new issue"; they also attack the validity of the act of the Legislature of February 16, 1866, and the assignment made in pursuance thereof, so far as they assume to give a preference to the school fund over the creditors of the bank, and to exclude all claims and demands against the bank of date after May 6, 1861. They insist that the notes owned by them were issued by the bank while it was still doing a legitimate banking business; that they were not issued in aid of insurrection or rebellion against the United States; that they are valid, subsisting obligations against said bank, and entitled to be paid equally with all the other notes issued by the bank prior to May 6, 1861; and that the notes issued by the bank, whether issued prior or subsequent to May 6, 1861, are entitled to priority over other creditors in payment out of the assets of the bank.

This answer is filed by Atchison and Duncan as well on their own behalf as on behalf of such other note holders as may see proper to come in and have themselves made parties; but none such have come in, so far as the record here shows. Said answer is not filed as a cross bill, and no relief is asked against the State.

On the hearing of the cause upon the answer of Atchison and Duncan, the Chancellor decreed that the notes held by them were valid claims against the bank, and, as such, entitled to priority of payment out of the assets of the bank, and valid in payment of debts to the bank. From this decree Watson, trustee, and the bank appealed.

By an agreement, of record below, John Hall, as trustee of Marion county, became a party by petition, claing that the proceeds of certain school lands in Marion county, deposited in the Bank of Tennessee, were preferred trust funds, entitled to priority of satisfaction. No action seems to have been taken below on this branch of the case.

It thus appears that the original bill has never been brought to a hearing in the court below, and that the proceedings on the cross bills of Cockrill and of McKinney and others, and on the answer of Atchison and Duncan, have only been preparatory to a final hearing on the original bill.

The question, whether the State had become a party joining in the original bill, so that relief could be legitimately sought against her for matters not embraced in, but entirely outside of, the original bill, was raised by the demurrers to the cross bill of B. R. McKinney and others. This court is of opinion, and so adjudges and decrees, that the Chancellor erred in overruling said demurrer, anr that the same should have been sustained; and so much of said cross bill as seeks to hold the State responsible for matters not embraced in the original bill, is now ordered by this court to be dismissed. The court is further of opinion, and so decrees, that the Chancellor committed no error in allowing the counsel for the State to dismiss the original bill so far as the State was a party complainant, and his decree in this regard is affirmed. It follows, that as the State is not now a party to the suit, no question is presented in the case involving the liability of the State, either to make good the original amount of $5,000,000 on which it was proposed that the bank should operate as capital; or to make good the common school fund, used as capital of the bank; or to make good the $5,000,000 of bonds, known as war bonds, bought and held by the bank; or to

make good the school land funds deposited in the bank by Marion and other counties; or to redeem the notes known as "new issue" of the bank, by receiving the same in payment of taxes; nor has the court considered the question, whether the State is entitled to be subrogated, in the distribution of the assets of the bank, to the extent of the old issue taken in by the State for taxes and cancelled. None of these questions are legitimately before the court, for the reason that the State is not now a party to the suit, and cannot be so made without her express consent.

Neither has the court considered the question of the statute of limitations as applicable to the notes known as "new issue," as it does not arise in regard to the new issue notes held by Atchison and Duncan, and these are all, except those tendered in payment by R. H. Jamison, that are involved in the case as presented by the record.

Upon the questions which are properly before the court for its determination, the court is of opinion, and so order, adjudge, and decree,—

1st. That when the common school fund was placed in the bank to constitute part of its capital, it became assets of the bank, to which the creditors of the bank have a right to look, and that these constituted a trust fund, applicable to the payment of the debts of the bank. That the act of the Legislature, passed February 16, 1866, so far as it attempted to appropriate the assets of the bank as school fund, impaired the obligation of the contract between the bank and its creditors, and was therefore null and void; as was also the assignment made in pursuance of that act, so far as it gave preference to the school fund. That said act and said assignment are also null and void, so far as they attempt to exclude claims and demands, otherwise valid against the bank, merely because they may have been created subsequent to May 6, 1861. From this it follows, that the Chancellor erred in sustaining the demurrers filed to Cockrill's cross bill, and his decree to that effect is reversed, and the defendants will be required to answer. It also follows that the demurrers of the bank and of the trustee to the cross bill of B. R. McKinney and others, were properly overruled, and the decree of the Chancellor in this regard is affirmed, and the defendants will be required to answer.

2d. The court is further of opinion, and so adjudges and decrees, that upon the statements in the answers and cross bills of said Cockrill, and of said McKinney and others, as to the character of their claims as depositors, they are valid creditors of the bank. But if there is any illegality in their claims, it will devolve upon the bank or trustee, by answer and proof, to show such illegality or invalidity.

3d. The court is further of opinion, and so adjudges and decrees, that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before these acts, to carry on a legitimate business, and that the receiving of deposits was a part of such legitimate banking business.

4th. That Marion and such other counties as deposited school land funds in the bank, are entitled to claim and receive from the bank such State bonds as can be identified as bonds bought with such school land funds in pursuance of law; but as to so much of said funds as cannot be so traced into State bonds,

now held by the bank, the counties entitled to such funds are creditors of the bank, having no priority over other depositors, or general creditors.

5th. That the notes of the bank, issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861.

6th. That in the case of the Bank v. Jamison, a transcript of which is incorporated in this record, and submitted with this cause, the circuit judge committed no error in sustaining Jamison's right to pay his debt to the bank in the "new issue" notes of the bank, at their face value, and the judgment in that case is affirmed; this court holding, that when the notes of the bank were issued and put in circulation, the law which makes them good in payment of debts to the bank was in force, and constituted part of the contract between the bank and all holders of the notes so issued and put in circulation by the bank. The statute of limitations was not pleaded by the bank against Jamison's notes tendered in payment, and therefore was not involved in the case in the court below or in this court.

It is further ordered and decreed, that the costs of this court be paid by the trustee out of the assets of the bank, and that the cause be remanded to the chancery court of Davidson county for further proceedings, to be had in accordwith the principles established by this decree.

THE STATE OF TENNESSEE, &c.

vs.

THE PRESIDENT AND DIRECTORS OF THE BANK OF TENNESSEE *et al.*

This cause came on to be heard on this 22d day of January, 1877, before the Honorable Supreme Court of Tennessee, sitting at Nashville: and was heard upon a transcript of the record and proceedings from the chancery court at Nashville, and upon argument of counsel, and upon the decree rendered in said chancery court upon the petition of Thomas S. Marr and other holders of the notes of said bank issued after May 6, 1861, filed in the cause on the——day of ———, 1875, and upon the answer filed to said petition.

Whereupon the court is of opinion, and so orders, adjudges, and decrees:

1st. That the notes of said bank are not barred by the statute of limitations of six years Sec. 2779 of the Code expressly excepted from the operation of the statute of limitations all notes "issued or put in circulation as money."

The object of said exception was to secure bank notes in the hands of innocent holders, and to preserve a continuing liability against the bank for their ultimate payment; and, therefore, such notes are excepted from the statute, whether they be still circulating as money or not, whether the bank be in operation or suspended, and whether its charter be in existence or has expired.

2d. That the operation of the statute of three years as to the personalty, and of seven years as to realty, of the bank, has not had the effect to vest the title in the trustee, Watson, adversely to the interest of those who may be declared entitled to the assets of the bank. By section 1494 of the Code, upon the dissolution of any corporation, the managers of the business of such corporation at the time of its dissolution, by whatever name known, are the trustees of the stockholders and creditors, unless other persons are appointed by the General Assembly, or by a court of competent authority, and are authorized to settle the business of the corporation,—dispose of property sufficient to pay its debts, and divide the remainder, after the payment of debts and necessary expenses, between the stockholders. Upon a dissolution of the bank, its control of its assets ceased, and the legislature had no right to direct their appropriation. Whoever had them in charge, became trustees for the statutory beneficiaries; and though Samuel Watson, upon the dissolution of the bank, came into possession of the assets, under an assignment made by the bank under the direction of the legislature, and though the assignment was valid to convey the legal title to the property, yet, so far as the act of the legislature and the terms of the assignment sought to give preferences as against the statutory beneficiaries, the same were invalid, as heretofore held by this court, and Watson, as trustee, could not hold the property otherwise than as charged with the same trusts they were subject to in the hands of the officers of the bank before, and at the time, they were assigned to him, nor could he hold them adversely to those whom the court may declare to be the statutory beneficiaries.

It also appears that Watson, having failed to give bond as trustee, was appointed receiver by the chancery court, and he has held the property, not as trustee, but as receiver. The property has been in *custodia legis*, and he is estopped from setting up title under the statute of limitations, either for himself, or for any one else than those who may be declared entitled to the fund under the orders and decrees of the court from which he received his appointment, and by which his possession was acquired and continued.

3d. The court is also of opinion that the claims of petitioners were not barred, and should not be excluded, by reason of the fact that they were not presented within five years after the expiration of the bank's charter. Upon the dissolution of a corporation, the assets become a trust fund for the benefit of creditors and stockholders; and while, in a court of law, no suit could be maintained by or against such dissolved corporation, yet a court of chancery has the right to take charge of the funds and apply them to the benefit of those entitled. The court, in administering upon a trust of that character, may order that the creditors shall present their claims by a certain reasonable time, or, in default, be excluded from the benefit of the decrees made in the cause; but in this case no such order was ever made previous to the decree now under examination, and no creditor can be barred until such decree is made, and notice published in conformity to it.

4th. The court is further of opinion, that the decree of Chancellor Mark

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE, EX REL. JAC. BLOOMSTEIN,

v.

THOMAS H. SNEED, TAX COLLECTOR.

J. B. HEISKELL, ATTORNEY GENERAL, FOR THE DEFENDANT.

In this cause, the State, whose name is somewhat incongruously used for the plaintiff, is the real defendant, and it is for the State that I appear, and I deny that the State or her officers is liable to the judgment sought here, for three reasons:

1st. That the remedy by *mandamus* does not lie to require an officer of the State to disobey a legislative mandate, either by the common law or by the law of Tennessee.

2d. That the courts of the State in which this suit was brought had no jurisdiction of the cause.

3d. That the usurped Government of 1861, from the time it arrayed itself against the United States, in armed resistance, 6th May, 1861, could not, directly or indirectly, impose upon the State any obligation or contract, and that the validity of all such attempts, if not all acts of such Government, depends upon a ratification of such act, either express, or implied from failing to repudiate them.

1st. The writ of *mandamus* does not lie to compel an officer to disobey a legislative mandate.

It is the peculiar province of the Legislature to deal with

questions of finance and revenue, and the sovereignty of the State, in this department of Government, is, in a peculiar sense, vested in the Legislature. To the Legislature, from time to time, is intrusted the making of all appropriations out of the public treasury, and, by our Constitution, no money can be drawn from the treasury except in consequence of appropriations made by law. To meet these appropriations, estimates are made, and the taxes of the State are regulated. It is therefore peculiarly a matter of legislative discretion how the officers of the revenue shall proceed in the conduct of their collections and payments into the treasury, as well as how the money, once in the treasury, shall be disbursed, and how far the courts will be allowed jurisdiction to interfere with this peculiar branch of the sovereignty of the State.

The law of the State of Tennessee is settled in the case of Williams *v.* The Register of West Tennessee, Cooke, 214, decided A. D. 1812, and never in any way questioned in the State, until now it is assailed by the counsel for the relator. That case, to my mind, settles, that, in matters peculiarly within the legislative control, as the disposition of the public lands, (and, by *parity* of reason, if not *a fortiori*, the collection and disbursement of the revenue,) the will of the Legislature is not to be controlled or interfered with by the courts, although the act of the Legislature may be obnoxious to the objection that it violates the State Constitution, which, in regard to the impairment of contracts, is the same as the Federal Constitution. In that case, the court say, "with the view we now possess of that subject, the act of 1809 *seems to be void on account of its repugnance to the Constitution.*" Revenue and taxes are peculiarly in the sphere of the legislative department of Government, and, in no well-regulated State, will the judiciary interfere with the exercise of the legislative will upon a subject so peculiarly within that department as this is. Perhaps no court has more properly appreciated the powers of the Legislature, or given them more admirable exposition, than this court in the case of Murray *v.* Hoboken Land & Improvement Co., 18 How., 272.

But this court has held that officers, to whom a discretion is confided, are not subject to any control by courts, in cases so numerous and consistent that it would be an affectation to cite them. The court of Tennessee, in Williams *v.* The Register, only held that, in matters peculiarly within the legislative power and control, they would not interfere by *mandamus,* where the Legislature had assumed to exercise the discretion itself, and had directed the officer not to exercise a given power.

This case also holds, as a question of State law affecting the jurisdiction of her own courts, that the suit against the officer was a suit against the State; and so the court had no jurisdiction. That doctrine, as the law of Tennessee, under her Constitution and laws, has never been questioned in any judicial utterance. It is recognized in the case at bar, and has been expressly made the ground of a decision in the case of Walters *v.* Morrow, Treasurer, decided at Knoxville, May Term, 1876, Ms. Of course, it will be said that this court holds a different doctrine in Osborne *v.* The United States, and other cases of that class, under the Constitution of the United States; but, clearly, each decision is conclusive, in regard to the matter to which it applies. If the courts of the State of Tennessee hold, in regard to their State Constitution, that a suit against the State means a suit against an officer of the State, with a view to reach not him, but the State, and that their jurisdiction is to be regulated by the substance, and not the form of the suit, I maintain that their construction of the State Constitution is as much binding on this court, as is the contrary holding of this court upon the construction of the 11th amendment to the Constitution of the United States obligatory upon them.

These points were settled by this decision long before the charter of the Bank of Tennessee was passed, and had not been denied in the holding of any court in that State at the time the charter was granted, or since; and they thereby become a rule of decision, not only in that court, but in this, under the ruling of this court in numerous cases.

At the time the charter was passed, it was then the law of Tennessee that no *mandamus* lay to compel a public officer to do an act prohibited by the Legislature, though by an act invalid as against the Constitution of the State and the United States.

It was the law of Tennessee, that a suit against a public officer, to compel him to an act to bind the State, was a suit against the State, within the provision of the State Constitution, as to suits against the State, whatever different holding may prevail as to similar clauses or phrases in the Constitutions of other States or of the United States.

It is, therefore, a case in which no *mandamus* lies in the name of the State to compel the State, by means of compulsion on its agents, by whom alone a State can act, to do what it has by its Legislature, acting peculiarly within its department, denied to its officers the authority to do.

In the case of Board of Liquidation *v.* McComb, 2 Otto, 531, the question involved was the jurisdiction of the *Circuit Courts* of the United States in injunction and *mandamus*, not the powers and jurisdiction of a State court. They depend, therefore, upon principles wholly different and authorities entirely dissimilar. That case came from a Circuit Court of the United States. No restriction in the law or decisions of Louisiana is intimated in the opinion; and if there were such, then the question still remains, how far such restriction would affect the equitable jurisdiction of the Federal courts? The present case comes from a State court, and involves the jurisdiction of that court, and in that class of cases State law alone is involved.

In the case of Davis *v.* Gray, 16 Wall., 220, the jurisdiction of a Circuit Court of the United States was involved and alone discussed and decided upon.

The case of Louisville and Nashville R. R. Co. *v.* The State, (8 Heis., 805,) upon full argument on both sides of the question, does decide that the power to *supersede* tax proceedings or to obstruct them by preventive measures, was not prohibited by the Constitution of the State guaranteeing the remedy by *certiorari*.

It is true, the same judge had previously delivered an opinion, in which he had overlooked the distinction between the remedies between citizens and between the State and its citizens, and between a *certiorari* and a *supersedeas*, which does not necessarily accompany the other writ.

In the other cases it will be found that no questions of jurisdiction are decided, and no question whether the State could be sued or not, was raised or determined.

No such authority existed at common law. It is an extraordinary remedy not grantable where there is any other common-law remedy. The tax-payer has the option to tender his alleged lawful medium of payment, and then refuse to pay further, and bring trespass for the illegal act, if it be illegal, of the officer distraining for the tax. The remedy by *mandamus* is somewhat like specific performance, if, indeed, it is not specific performance in its every essential, and that is not such a remedy as is within the protection of the Constitution of the United States. Certainly not so if there be any other ordinary remedy by the course of the common law.

But it is said the remedy by *mandamus* was regulated by the act of 1831, and that is read and treated as if its particular application to this case was so defined as to make it part of the charter of the bank and of the contract with the State. On the contrary, the act of 1831, is simply an act to define where the jurisdiction of the cases in which *mandamus* lay was to be exercised—first, in Circuit Courts; and second, locally, in what particular Circuit Courts. That is the whole scope of the act. It is entitled, "An act to regulate the practice in cases of *mandamus*." (Sess. Acts, c. 51, p. 75.)

It in no manner affects the extent of the jurisdiction, nor confers jurisdiction in any case in which the common law did not give the jurisdiction, as the common law was held in Tennessee to be. It in no manner affects the decision in the case of Williams *v.* The Register, but vests the jurisdiction, subject to the restriction established in that case, in the courts mentioned.

2d. In the view that this is a question of the jurisdiction of a State court over a matter involving State policy and State revenue, I respectfully suggest that the action of the State court is entitled to the highest consideration, and as it is supported by a case decided long before the rights of these parties accrued, it becomes, under the rule of this court, in Gilpecke *v.* City of Dubuque, 1 Wall., 206, controlling and conclusive. But in the case of Adams *v.* City of Nashville, MS. Opinion, by Mr. Justice Hunt, November 5, 1877, the decision in the case reviewed, on a question of State law, was held to be authoritative.

But in another view, it seems to me this court cannot reverse the decision of the State court.

The jurisdiction of the courts of Tennessee was defined by the laws, including the repealing act of 1865, taking from the courts all right to entertain suits against the State. The Constitution of 1870 was passed, and it declared that "the jurisdiction of the Circuit, Chancery, and other inferior courts, shall be as now established by law, until changed by the Legislature." (Art. 6, sec. 8.) Under that Constitution, all

the judges in the State were elected, and inducted into office. With what jurisdiction? They were sworn to support that Constitution. Can it be said that, notwithstanding the withdrawal of jurisdiction of suits against the State, they still possessed the jurisdiction taken away? This court has held that there are certain acts of States which, however they may have the effect to violate contracts, they cannot obviate; as where a board of levee commissioners was abolished, this court held that no *mandamus* lay to them to act, though the effect of the abolition was to destroy a remedy. Now, the court could as well hold that the repeal of the levee boards was void as to previous contracts, as to hold that a withdrawal of jurisdiction was valid only *pro tanto*. The Constitution of Tennessee, of 1870, was, in effect, the abolition of the old courts, and the institution of new ones, and these new ones never had any jurisdiction but what they then acquired, and they acquired none by descent. Nothing but by the clause above quoted, and that is to be read as referring to the statutes of the State, not as those statutes might be varied by matter *in pais*; not as established by law, except as to certain cases not known to the makers of the Constitution.

But as to the Supreme Court of Tennessee, from which this appeal comes, it, was wholly reconstituted, and its jurisdiction could not, upon its new creation, have any aid from its predecessor. If an act taking away jurisdiction might be held void, which I deny as to the very court from which it is taken, then it must still be unquestionable that a new court constituted in lieu of that one, and upon which that jurisdiction never was conferred, could not, by virtue of any provision in the Constitution of the United States, have a jurisdiction which the law never gave. Whatever extension may be given to the doctrine that remedies cannot be repealed, the Constitution of the United States and construction by this court can never go to the length that a court which never had the jurisdiction to do a particular thing can have it actively conferred by construction and judicial interposition of this court. This would be utterly inconsistent with the decisions of this court, and

with the whole principle upon which acts of State Legislatures are annulled or restricted in their operation.

Constitution of Tennessee, art. 6, § 2:

"The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State.

"The judges shall designate one of their own number, who shall preside as chief justice.

"The concurrence of three judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only under such restrictions and regulations as may from time to time be prescribed by law, but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court."

This last clause is an extract from the Constitution of 1834, intended to preserve some original or peculiar jurisdiction, the history of which seems to be lost to the profession, as it has been held that the Constitution of 1834 deprived the court of all original jurisdiction. (Miller *v.* Conlee, 5 Sneed, 434.)

3. As to the power of the government of 1861 to bind the State.

In the somewhat complex relations of our States and of the United States, it is difficult to obtain a clear view, or to present clearly the effect of a collision of arms and of revolution in a State.

Since the argument in the State court, the history of the country has suggested cases which may serve to resolve these questions into their simplest elements. Suppose, then, that two parties in a State, each claiming to be the legitimate government, shall organize each all the essential elements of a complete State Government, and each exercise the function under pre-existing laws of making contracts, or issuing bonds in the name of the State? Or suppose each shall grant the same land to different grantees, or the same exclusive franchises to different corporations? Now, when the issue is settled, which of these is the true government, by the success and permanent establishment of one of these contending par-

ties, which contract, which bond, which grant for land or franchise will prevail? They cannot both be valid and obligatory. The victorious government may adopt acts of the subjugated party, but that is a different consideration. Only one set of these acts are valid *per se*. Which? Certainly those of the party which turns out to be the State.

But the acts of secession of 1861 complicated this simple question by bringing into it the relation of the Federal Government and the civil war in the States. A party existed in Tennessee which asserted from the beginning the nullity of the act of secession, and the other States, from the date of that measure, regarded the acts of the Government of 1861 as null and void. From that time the issue was in process of settlement by wager of battle; and previous to 1865 that issue was determined by the victory of the Federal arms, and the State Government of 1865 established on a firm basis. Now, my theory is, that from the time the Government of 1861 assumed the attitude of resistance, it became incapable of binding the State to any contract, or of imposing upon the State any obligation which the State, when it came to its own again, was bound to submit to as its own contract and obligation. What may be the usage of modern nations in respecting acts of revolutionary and provisional governments is not the question. It is simply, Is the victorious party in a civil war bound to submit to the contracts and obligations assumed by the subjugated party in the name of the State as obligations and contracts of the State? I submit, then, that the acts of the Government of 1861, by which that Government undertook to bind the State, were never binding on the State as reconstructed and reorganized in 1865, that being the only Government that had possessed the authority to bind the State; in other words, that being the State.

Now much is said about government *de facto* and officers *de facto*. Undoubtedly, in matters indifferent to the body politic, and, especially, in all matters which it is the interest of the State to leave undisturbed, the usage of nations is to regard them as being valid; and the relator's brief abounds in such cases, and on this subject it cites no others. I cheer-

fully concede the law to be that all such acts are valid, either of themselves, by a sort of implied recognition, or become so by the failure of the successful party to repudiate them. Upon which leg the matter stands is a mere matter of theory, and of no consequence in practice. I concede further, that, as to indifferent contracts of individuals *inter sese*, there is no principle that affects their validity because the nation is in war, civil or international. But, as I have shown above, the rightful Government can alone bind the State; and, in a civil war, that is the rightful which is established. I maintain, then, that, from the 6th of May, 1861, the Government of 1861 could impose no obligation upon the State. The United States have not only recognized this doctrine of the want of power to bind, but they have, by the 14th amendment, sec. 4, restricted the power of the States to ratify certain of these contracts, wherever they are directly connected with the levying of war. If these were contracts of a *de facto* government, (and the contracts of a *de facto* government are binding on a *de jure* government afterwards established by the issue of war,) then the United States have done a most unjust act in compelling States to repudiate obligatory contracts imposed by due authority. If, on the contrary, the theory is the true one, that the State is not bound by any contract of a usurpation temporarily in possession of the powers of the State, then the amendment is a just discrimination and restriction, which allows the State to exercise its own discretion in ratifying and adopting such contracts as have been made for proper objects, and prohibiting any ratification of such as were for resistance of the National Governments.

I repeat, if the *de facto* Government of a State has power to bind the State, it must, in virtue of its *de facto* sovereignty, be the judge of what it shall bind the State for; and what it decides to bind it for cannot be held to be subject to those rules which courts apply to contracts against public policy. The power to bind exists, or it does not. It does not exist in part, and non-exist in part.

The case of Howe *v.* Lockhart, 17 Wall., 580, holds that a law of Alabama directing investments in Confederate bonds

was void as being "a direct contribution to the resources of the Confederate Government. It is true, the court *arguendo* state briefly the general proposition, that other laws are to be regarded as valid, but whether by virtue of their implied adoption and recognition they do not say.

In the case of Huntingdon *v.* Texas, 16 Wall., 402, there was no act by the reconstructed State in any manner rebutting the implied approval of the issue of the bonds, and so no fact to raise the question whether the act was valid *per se*, or by reason of an implied ratification. I admit, the language is strong, but it is not a *decision* upon the point now raised.

Sprott *v.* U. S., 20 Wall., 464, was a case involving a claim to cotton under the Confederate States, and did not involve the question of the powers of the States. Its general statements are, therefore, to be taken as other *obiter dicta* on matters aside from the point in issue.

United States *v.* Insurance Cos., 22 Wall., 102, contains a review of all the cases. It will be seen that the first of the cases, 7 Wall., 700, as cited in 22 Wall., shows that Chief Justice Chase, in his opinion, does not pretend to speak accurately, but prefaces his remarks with, "It may be stated perhaps, with sufficient accuracy," &c., showing that the court was not upon these matters, considering the point now in controversy.

In all the cases, then, decided by this court, and cited by the relator's counsel, there is not one that decides upon a state of facts involving the principle of this case.

It is merely, in effect, a holding that, in the absence of a repudiating act, the courts will only condemn such acts as they can themselves see that it is the duty and policy of the State not to ratify.

But this case is subject to another complication. The Bank of Tennessee was a corporation of which the State was the sole stockholder, and, as such corporation, it stood in a relation to the State which is not of the simplest character. In one sense, it was a person with certain powers, with certain property which it had the right to bind or dispose of, subject to sue and

be sued, and to be governed by a directory established by the State and appointed by the Legislature.

In another sense, this bank was merely a fiscal agency of the State, as much so as a treasury department incorporated and made subject to suit. It received and kept all the State revenue, and all the business of the treasury was done through the agency of the bank, the treasurer receiving nothing and paying out nothing.

A view of this institution, which considers and regards it as a mere corporation managed by a directory, without considering its other aspect, will be misleading and tend to erroneous conclusions. (See extract from brief in Supreme Court of Tennessee.)

The courts of Tennessee have regarded it in both aspects. When they decided the case of Atchison & Duncan against the bank, they treated the bank as a corporation disposing of its own assets, and binding its own effects. It seemed to me that even there they might have looked deeper and seen by its relation to the State that it was to share the fate of the Government that controlled it. But the court thought otherwise, and that decision is subject to no review. But when the case came to be presented in view of the right of the bank to bind the State, they held that while the Government of 1861 could not directly bind the *State*; so, that the bank, while in the control of that Government of 1861, could not bind the State by indirection. (See Rec., p. 150, for opinion.)

Now, let us resort to comparison again for a moment. Suppose the Dorr Government in Rhode Island to have found a State Bank there, which it was the right of the State to control, and whose issues the State guaranteed. Suppose that Dorr seized upon it and compelled it to issue circulating notes for his war purposes; and suppose him to have afterwards been put down and the Government re-established; passing the question of the right of the bank to repudiate her issue, would any one pretend that the State would be bound as guarantor upon such issue?

But in this case it is said no such thing took place, the bank used old issues for these unlawful purposes, and the new

issues was only used for lawful purposes. The *State*, the real State, was, as we have seen, bound by no act of the Government of 1861, and by no act of the bank under its manipulation for war purposes, and it had the right to repudiate all its acts during the control of the Government of 1861. But its acts could be distinguished with accuracy only as to the notes issued by the bank while under that unlawful control. The State when restored, therefore, impliedly adopted the issues outstanding or reissued, but refused to recognize that so unlawfully issued, so far as it was distinguishable by date or by the signature of the President, Torbett, who came in three days after the ordinance of separation.

But it is said there is nothing to condemn these issues, as being issued to aid the war. To return to the illustration of the Dorr Rebellion. Suppose, instead of compelling the bank to issue new notes, he had simply seized and used the assets and effects, and the bank, while he still held control over it, had proceeded to issue the new notes, could this indirection affect the fact that it was by his act that the new liability was to be saddled on the State? While we are not able to trace the new issues of the bank into the war bonds, $4,625,000 of which the bank took, issuing its notes therefor, we do show an absorption of that much by the military commissioners of the State, and that this appropriation of the old issues led to the necessity of the new issues is unquestionable. Whether this was designed to avoid the consequence of illegality, or whether it was merely the natural consequence of the precedent facts can in my view make no difference. If Dorr had, when he seized upon his supposed bank, directed his directory to issue new notes for ordinary purposes, and had seized only upon the old and existing issues, he could not by that device have avoided the consequence that the supposed contract resulting from the issue of such notes would not bind the State. The form in which this thing was done, was not of the essence of it. If, without any caution to his directors he seized the funds which were in the bank for reissue, and the new issue merely re-

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sulted as the natural consequence, the legal effect would be the same.

It is said, however, that the issue was not abnormal or excessive, measuring by other years. In statistics general average may be a matter of great importance, but in a question like this each period must afford the measure of its own needs and requirements. The bank had, and issued to the military board $4,625,000. The legitimate business of the bank in this state of things, called for the additional issue of $1,469,000. Suppose that 4¾ millions had remained in the bank: where would have been the need of this new issue? If we are to derive anything from the condition of affairs, why do we turn from that which existed then to what existed the year before, and the year before that, to see what is clear from the present time and its lessons. The exigencies of 1861 are measured by an issue of 1½ millions, after a subtraction of 4¾ millions, for purposes admitted to be illegal. The 4¾ millions therefore in hand, as compared with this 1½, afford the measure of the needs of that time. If the 4¾ had remained, would they have supplied the 1½ or not is a question of fact.

There is no question here of innocent holder for value. History supplied the notice to all persons who dealt in these supposed securities, of all the facts necessary to put them on their guard as to their validity, and they must be treated as purchasers with notice. This applies to all persons dealing with the bank at the time these notes were being issued, as they must be charged with knowledge of passing public events.

Extract from the Brief of Hon. W. F. Cooper, in the Supreme Court of Tennessee.

My first position in regard to these claims is, that they were void in their inception, if the lawful Government chose so to treat them, and that the political departments of both the State and General Government have chosen so to treat them, and the courts cannot go behind their action.

The people of the State of Tennessee undertook to separate from the United States and join the Confederate States. This was accomplished, as far as it could be done, by the act of separation, and the legislation of the 6th of May, 1861, and the effect of what was done was to bring the State, as then controlled, and especially its legislative and executive branches, and the Bank of Tennessee, as their fiscal agent, into rebellion and war with the United States. It has been repeatedly decided by the courts of the United States that war is a state of facts, and needs no proclamation of the President or act of Congress to establish it; but that if anything was needed, it was supplied by the President's proclamation of the 15th of April, 1861, declaring the existence of an insurrection. (The Prize Cases, 2 Black, 635; Lawrence's Wheat., 535.)

"As a civil war," says the Supreme Court of the United States, in the Prize Cases, "is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know."

"All persons residing within this [insurrectionary] territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

In the case of *Luther* v. *Borden*, (7 How., 1,) the Supreme Court of the United States held that the same principles and rights applied to a rebellion within a State, where a new (or illegal) Government undertakes to overthrow an old (or legal) Government. The Legislature of the old Government had in that case established martial law, and Chief Justice Taney, in delivering the opinion of the court, observed, among other things, that "if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which we can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself, and overcome the unlawful opposition."

This language is quoted by Nelson, J., in his opinion in the prize cases, with approbation.

Now, what was the effect of the status brought about by the acts of the rebellious government in this State, on the 6th of May, 1861, and afterwards, until the lawful authority was restored, upon the acts of the rebellious Government with its citizens, and upon the acts of the citizens as between themselves? It is upon the answer to this question that the correctness of our first position must, in a great measure, depend.

Here is what Chief Justice Taney says on the subject, in *Luther* v. *Borden*, (7 How., 1, 39,) and he is borne out by all the elementary text writers:

"The laws passed by its Legislature during that time (during the time a State is in rebellion) were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of all its courts in civil and criminal cases null and void, and the officers who carried the decisions into operation answerable as trespassers, if not in some cases as criminals."

"It rests," he says, "with the political power of a State to pronounce upon the legality or illegality of the government acting for the time being.

"Moreover," he adds, "the Constitution of the United

States, as far as it has provided for an emergency of the kind, and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." (7 How., 42.)

The Dorr rebellion of Rhode Island, which was the particular rebellion under consideration, was not a rebellion of a part of the State against the whole. It was a rebellion of the whole State, by holding conventions, elected by, it was claimed, a majority of the people, and by a Legislature chosen in like manner, and its successful and continued organization would, as Chief Justice Taney said, have made the acts of the old Government illegal and void. It is the political department of the Government that survives the rebellion, without reference to the abstract question of right or wrong, which is clothed with the power "to pronounce upon the legality or illegality of the Government acting for the time being." And this, whether the rebellion be of a whole State, as in the case just mentioned, or of a part of a State, as in the case of the Franklin Government, presently to be noticed, and whether the rebellion continue, as in both these instances, only for a few months, or for only two or three years, as in the case of our own rebel State Government, or for twenty years, as in England during the great revolution, which ended with the Protectorate of Cromwell.

To the same effect as *Luther* v. *Borden* is one of our own early cases, *Ingram* v. *Cocke*, 1 Tenn., 19, in relation to the acts of the Franklin Government. The court say, in that case: "When Governments *de facto* cease to exist, the former or legitimate Government, by their legislative acts, usually furnish the grounds upon which municipal courts proceed in giving an opinion." In other words, to use the language of the Supreme Court of the United States, *White* v. *Hart*, 13 Wall., 651, "the result (to the rebel citizen) depends upon the rule, as defined in the law of the sovereign against whom he has offended." The action of the political department under which the judges hold their offices, upon anything done pending the rebellion, is conclusive upon the courts.

(See also *Rose* v. *Himely*, 4 Cr., 273; 3 Wheat., 324, 364; 13 Pet., 420; *White* v. *Hart*, 13 Wall., 649.)

By turning to Mr. Meigs's Digest, § 988, it will be seen that the Franklin Government adopted a constitution on the 14th of December, 1784, and ceased to exist about September, 1787. It will be seen, also, that the Legislature of Tennessee passed several acts, from time to time, validating proceedings under the Franklin Government, such as the granting of letters of administration, probate of instruments, and even marriages. Some of these acts are cited by Judge Haywood, in delivering the opinion in *Townsend* v. *Townsend*, Peck, 1, as retrospective laws which were valid.

The right of confiscation by the successful belligerent may be referred to in this connection. "The question of what shall be done with enemy's property," says Chancellor Kent, "is one rather of policy than of law, and is one properly addressed to the consideration of the Legislature, and not to the courts." (1 Kent's Comm., 60.)

"Respecting the power of Government (to confiscate enemy's property,)" said Marshall, Chief Justice, "no doubt is entertained. That war gives the full right to take persons, and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and, when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will." (*Brown* v. *United States*, 8 Cr., 110, 143.)

This doctrine was applied in all its rigor, without reference to their personal loyalty or disloyalty, to the citizens of the Confederate States, as enemies, in *Miller* v. *United States*, 11 Wall., 268.

I do not understand that there is any conflict of authority on these two points; that it belongs to the political department of the successful Government to say what laws and what acts of the rebellious Government, or of its citizens, shall be valid or invalid, and to determine whether any and what

property of the rebels shall be confiscated or destroyed, and that, in the language of Chief Justice Marshall, "the judicial department must give effect to its will."

With these principles distinctly before us, let us see now what has been done in the premises by the political departments of the State and United States Governments.

The fifth section to the schedule to the constitutional amendments, passed in February, 1865, while the war was still flagrant, by a convention and under a State Government recognized by the Government of the United States, provides: "All laws, ordinances, and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State Government, after the declared independence of the State of Tennessee, on or after the 6th of May, 1861, are unconstitutional, null, and void from the beginning," with a proviso in favor of judicial decisions made pursuant to the laws enacted previous to that date, and between parties in court and litigating their rights.

Section sixth is: "All laws, ordinances, and resolutions of the usurped State Government, passed on or after the 6th day of May, 1861, providing for the issuance of State bonds, also all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th of May, 1861, and all debts contracted in the name of the State by said authority, are unconstitutional, null, and void; and no Legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The act of the Legislature of the 16th of February, 1866, chap. 28, provides for the winding up of the Bank of Tennessee, and directs an assignment to be made to secure, first, the school fund, and second, the remaining creditors of said bank, "excluding all claims and demands of all kinds after the 6th of May, 1861, as absolutely null and void."

By the joint resolution of Congress of the 24th of July, 1866, restoring Tennessee to its rights in the Union, the adoption of the constitutional amendments whereby "all ordinances and laws of secession, and debts contracted under the

same, are declared void," is referred to, and made the ground in part of the restoration of the State to its rights.

And by the fourth section of the fourteenth amendment to the Constitution of the United States it is declared that "all debts, obligations, and claims incurred in aid of insurrection and rebellion against the United States shall be held illegal and void," and the United States and any State are forbid to assume or pay the same.

The sixth section of the schedule to the constitutional amendments of 1865, expressly designates the new issue of the Bank of Tennessee as illegal and void, and also the claims of the depositors of the bank by deposits made after the 6th of May, 1861, if such claims are, as contended for on the other side, debts of the State. And the act of the Legislature of the 16th of February, 1866, expressly puts the seal of condemnation on the claims of these depositors. This was an act of the political department of the Government shortly after the State had again come under the control of a loyal Government, and before the proclamation of the President of the United States, which declared the insurrection in Tennessee to be at an end. And whether he construe the act as the exercise of the war power of confiscation, or as a legitimate designation of the invalidity of certain acts for the guidance of the courts, is immaterial. In either event, it was within the competency of the political department of the Government, and conclusive on the courts.

The effect of the constitutional amendments of 1865 was to designate as void all laws, etc., passed after the 6th of May, 1861, but impliedly to leave all previous laws in full force and effect, and to validate everything done under them. So the designation of certain particulars as void by the 6th section in like manner left the courts to infer that they might treat as valid everything not thus specially designated. And inasmuch as every act of the rebellious Government, or its subjects, was, as we have seen, illegal and void at the option of the legitimate Government, the schedules to the Constitution of 1865 were more merciful than could have been reasonably expected from a victorious Government. Whether the

selection of the acts to be treated as void was wise, or just, or proper, was for the political department to determine. This action of the political department of the successful State Government was, in effect, sanctioned by the political department of the United States Government, both by recognizing the State Government, and afterwards by the resolution of Congress of the 24th of July, 1866.

The schedules to the Constitution of 1865 and the act of the Legislature of the 16th of February, 1866, are not, in this view, attempts to impair the obligation of contracts, which is the argument on the other side, and which we concede cannot be done, but are legitimate acts of the political departments of the State and United States Governments, strictly within their competency, designating, among the various proceedings which took place during the rebellion, and all of which were illegal and invalid, so far as the legitimate Government was concerned, such of them as should be treated as void, and impliedly validating all others, thus giving the courts, in the language of our Supreme Court in *Ingram* v. *Cocke*, 1 Tenn., 19, "the ground upon which they should proceed."

We agree that the annulling of a valid contract by subsequent legislative act or constitutional amendment would be void, because in conflict with that provision of the Constitution of the United States which prohibits the impairing of the obligation of a contract. But that provision of the Constitution can certainly have no application to contracts entered into under a usurped Government, by and between persons in insurrection and rebellion; and, *a fortiori*, to contracts between the usurped and rebellious Government itself, through its fiscal agent and its rebel subjects. All such so-called contracts are at the mercy of the legitimate Government, when restored. It is for the political department of the Government to say how they shall be treated by the courts. The rights of the rebel States and their citizens under the Constitution were, as said by the Supreme Court of the United States in *White* v. *Hart*, 13 Wall., 651, "suspended," and the extent of the punishment, either of person or property, depended upon the rule as defined in the law of the offended

sovereign. Those States, as said by the same court, on the same page, were at no time out of the pale of the Union. Their citizens had not the rights, therefore, of a foreign enemy who has been subjugated, but only such rights as the offended sovereign might see proper to extend to them.

The learned Chancellor, in his opinion in the court below, seemed to think that there was a distinction between contracts entered into under ordinances and laws of secession, or directly with the rebel authorities or agents, and contracts between private citizens, and that the ban of invalidity could only be predicated of the former. But I do not understand that any such line of distinction exists. By the rebellion, those who became parties to it, either voluntarily or through coercion of circumstances, are placed at once out of the pale of the law; and everything they may do, either with their rebel Government or between themselves, is tainted with illegality, and void, if the legitimate Government chooses so to treat it through the action of its political department. Of course, modern usages do not ordinarily result in such indiscriminate condemnation of all acts, public and private. But, to use the language of C. J. Marshall, already quoted: "The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will, more or less, affect the exercise of this right, but cannot impair the right itself." And certainly no just complaint can be made upon the score of the unmerciful exercise of the right in this State. The condemnation was limited to a class of claims which, to say the least, were open to grave suspicion, if not clearly guilty of direct aid to the rebellion.

Moreover, even if the obligation suggested were well founded, it could have no application to the "new issue" of the Bank of Tennessee. That issue may be literally said to have been put into circulation "under the ordinances and laws" of the rebellious State Government. Except for the fact that four millions of State bonds were authorized by that Government to be issued for war purposes, and that a Military Board was organized to arm and equip troops, and purchase military stores in aid of the rebellion, and the bank, as

the property and fiscal agent of the State, was required to lend its assistance, and did so lend it with full knowledge on the part of its officers of the unlawful purpose, not a dollar of the "new issue" and less of the "old issue" would have been used. If, in order to stamp this "new issue" with illegality, it should be deemed necessary that it should owe its issuance to a law or ordinance of secession, and to the direct act of the rebel authorities, these are not wanting. Any person who dealt directly with the bank during that period dealt with the rebel State Government, just as much so, under the proof, as if it had dealt directly with the Military Board or the Governor or the Treasurer of the State. The legislation of May, 1861, changed the character of the institution from that of a bank for ordinary banking purposes to that of a fiscal agent of a formidable rebellion. It is too weak a phrase to say that the bank was the right arm of the rebel State Government—it was the Government itself, and its every act was the act of that Government. As well might you attempt to shield from the charge of illegality acts of the Military Board, because those acts were between private citizens, as the acts of the Bank of Tennessee. And no one will pretend that the acts of the rebel Government and all its branches and agents were not void. (See *U. S.* v. *Keehler*, 9 Wall., 83; *Hickman* v. *Jones*, 9 Wall., 193.)

My argument, let it be distinctly understood, does not call in question any decision of this court heretofore made. It concedes their correctness to the full extent to which they have gone. For, while I contend that all acts of the rebel Government and of its citizens, while in rebellion, were illegal and void, because done without the pale of the Constitution and laws, from which they had withdrawn, I concede that all of those acts were amnestied and validated by the action of the political department of the United States, and of the lawful State Government, except those specially excepted, and except, also, such as were, in their very nature, treasonable, and therefore void. I may concede, also, that ordinary contracts between individuals, not made with the rebel authorties or their agents, and not tainted with illegality by their very

nature, are ordinarily considered as validated by the silence of the conquering Government in regard to them. The courts would feel at liberty to treat such contracts as valid by the modern usages of war, unless specially directed by the political department of their own Government to treat them otherwise. This is the only case which has come before this court where the act brought in question was the direct act, as we contend, of the rebel State Government, and positively declared to be illegal and void by the political department of the loyal State Government, and, as we insist, also, by the political department of the United States Government. It raises, therefore, a question not heretofore brought before the court in reference to acts and contracts done and entered into pending the civil war, and that is, whether the action of the political department of the Government, in regard to any such acts and contracts, is not conclusive upon the courts. My argument is based upon the conclusiveness of such action.

But, it may be said, the schedule to the constitutional amendment is abrogated by Article 11, section 1, of the Constitution of 1870. That section is in these words: "All laws and ordinances now in force and in use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature; but ordinances contained in any former Constitution, or schedule thereto, are hereby abrogated."

The language is, "ordinances contained in any former *Constitution or schedule thereto.*" Are the constitutional amendments of 1865 a constitution, within the meaning of the section? And are the provisions of the schedule which we have been commenting on, ordinances, within the meaning of the section?

These are, perhaps, hypercritical questions, which it is scarcely necessary to answer. The abrogation of the 5th and 6th sections of the amendments of 1865 would not have the effect supposed. The provisions of those sections did not annul the laws, ordinances, acts, and proceedings specially mentioned. They were illegal and void before. The true effect of these sections was, by implication, as we have seen,

to validate all acts done during the rebellion, except the acts set apart and designated. As to them, it was a direction for the guidance of the courts, that they alone were to be treated as void *ab initio*. The abrogation of the sections may invalidate what was impliedly validated thereby, but it cannot render that valid which was, from the beginning, void.

Besides, the provision of the new Constitution does not abrogate the act of the Legislature of the 16th of February, 1866, nor the resolution of Congress restoring Tennessee to its rights. It did not require a constitutional amendment or ordinance to express the will of the political department of the State Government on the subject. An act of the Legislature was equally efficacious. And this act, if the point be at all material, was passed before the 2d of April, 1866, when the President of the United States officially announced, by proclamation, that the insurrection in Tennessee was at an end.

It is obvious, therefore, that the abrogation mentioned can have no effect upon the question we have been discussing.

If we are right in our argument, the courts have no option, except to pronounce the claims under consideration illegal and void, leaving the parties to apply to the Legislature for redress.

The question of the illegality of the claims of these depositors growing out of the facts which have been introduced in regard to the "new issue," does not arise as the record now stands. The case of the depositors comes up on demurrer, and, of course, no evidence has been taken on this point.

If we are wrong in our argument, the question still remains, so far as the "new issue" is concerned, whether it is not illegal and void, because, as a matter of fact, issued in aid of the rebellion, and under the fourth section of the fourteenth amendment to the Constitution of the United States.

The proof is, that a military board was established on the 24th of April, 1861, by the rebellious State Government, for the purpose of arming and equipping troops, and purchasing military stores in the war then flagrant between the United States and the rebellious States; that this board drew from

the Bank of Tennessee, and used for the purposes aforesaid, in the year 1861, the sum of $4,625,460.48, the president, cashier, and other officers and directors of the Bank of Tennessee knowing at the time that the military board was organized to aid the rebellion, and that the money drawn from the bank by the board was to be used, and was used, for this purpose. It further appears that the "new issue" was put into circulation by the bank after the 6th of May, 1861, and in order to meet the demands of its regular business and of the military board. The charter of the Bank of Tennessee shows that the bank belonged exclusively to the State, and was its fiscal agent. The court, moreover, knows judicially that the State joined the other Confederate States in rebellion, and that all its resources were used by the rebel State Government for the purpose of aiding the rebellion, and that the Bank of Tennessee was especially made an instrument to this end.

The statement of the business of the bank in 1861, in connection with the demands made upon it by the military board, shows that the new issue was put into circulation to meet the extra demand for currency occasioned by the calls of that board. The drafts of the board and of the rebel State Government are far more than enough to cover the new issue. No amount of testimony could make it plainer that the bank was forced to resort to the new issue by the draft upon its resources for war purposes. If so, it is obvious, that being issued for illegal purposes, they are void, in whosesoever hands they may come. (*Thomas* v. *Richmond*, 12 Wall., 349; *Hanauer* v. *Doane*, 12 Wall., 342; 2 South. Review, p. 73.)

The argument against this view is, that some of the business of the bank in 1861 being of the usual character, it is impossible to distinguish between the legal acts and the illegal, and that the doubt will inure to the advantage of the holder. But, as matter of fact by the evidence, the "new issue" must be taken to have been put in circulation solely by the pressure on the bank occasioned by the demands of the military board and the rebel Government. No doubt some of the old issue, which otherwise would have lain in the vaults, was used on account of the same pressure. The old issue thus

used cannot be identified; the new can. *It is not the consideration upon which it was actually issued that constitutes its illegality.* Some Confederate money may have been issued to buy food for women and children. It is the fact that the money was issued at all, that makes it illegal—its use being shown to have arisen by reason of the exigency of the war. No one could contend that Confederate money was not void as between the holder and the maker, the Confederate Government, although it may have been issued, in some instances, upon an innocent consideration, and may have constituted a good consideration in contracts between individuals. So, we insist, that no matter what may have been the actual consideration for the issuance of any part of it, the "new issue" is illegal as between the holder and the bank as the fiscal agent of the rebel State Government. (See *Thorington* v. *Smith*, 8 Wall., 1, 11, as commented on in *Naff* v. *Crawford*, 1 Heisk., 123.)

And even in the most favorable view for the note-holder, it is a case of "partial illegality." But "partial illegality" is as fatal as "total illegality." (See Mr. Daniel's article in 2 South. Review, p. 85, where the authorities are collected.)

If, under the circumstances, it were material to show the nature of the particular transaction in which the notes were put into circulation, there is enough in the record to make out a *prima facie* case of illegality, and to throw the burden upon the holder.

It is difficult, moreover, to see how the "new issue" can escape the sweeping provision of the 4th section of the fourteenth amendment. That provision is: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, * * *; but all such debts, obligations and claims shall be held illegal and void." And whether this prohibition is to be considered as restricted to "debts, obligations and claims" of States, or is extended to such debts, etc., between individuals, is immaterial.

Extract from Brief of J. B. Heiskell, in Supreme Court of Tennessee.

CONSTITUTION OF THE UNITED STATES—CONTRACTS.

Into all this, the Constitution of the United States affecting contracts, does not enter. Suppose a suit was brought between two parties in a municipal corporation, to determine which is the proper authority, and pending the suit each party claims to act and does act for the municipality, when the suit comes to be decided, and this court comes to hold that one party was the rightful party, and the others had no claim of right to bind the corporation, does it impair the obligation of contracts? No more does it impair the obligation of contracts, than it does when it declares that my attorney in fact, who has made a contract *ultra vires*, has not bound me. Now, a civil war is but a grander *lis*, a wager of battle. When this is decided, and one of the parties to it declares that the other was never the rightful Government, it is not the impairing of contracts which happens, but it is a mere declaration of the result—that the overthrown Government had no authority to make the contract.

But it is said that the State must take all the contracts of the Bank of Tennessee or none. I deny that any such condition is imposed by the laws of nations upon States. When the United States sued in the courts of Great Britain for the funds of the Confederate States in the hands of British subjects or residents, did Great Britain or her courts stop to ask whether the United States intended to pay all the debts of the Confederate States? By no means. Did she even require her to apply any portion of the funds to pay the British creditors of the Confederate Government? Not at all. This is a precedent of the highest authority for our guidance here. The present State Government can recover the debts of the late State Government, without subjecting herself to any conditions whatever. So she can claim the benefit of any contracts of the bank as the fiscal agent of the State, though made with-

out authority, and is not bound at all by other acts done without authority. If a trespasser makes rails on my land out of my timber, I may keep the rails, but surely I am not bound to pay his hands. I take the benefit of his wrongful act, but do not render myself liable for his act by which the benefit was accomplished.

The following language is held by the court in *United States* v. *McRae*, 8 Law Rep., 84, Eq.: "The moneys, goods and treasure, which were, at the outbreak, the public property of the plaintiff, and which were seized by the rebels, still continued their moneys, goods and treasure, their right of property and rights of possession being nowise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion, any of such moneys, goods or treasure, or the produce thereof, capable of being identified or earmarked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, a *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution, *simpliciter*. If he had received it as an innocent factor, banker, or other agent, the right to restitution would be, or might be, of a more qualified or limited kind. It would be, or might be, subject to any claim or lien which in his character of innocent bailee without notice he might have." The rights would depend upon the law of bailment, etc.

The case of White *v.* Texas, 7 Wall., 700, cited by the counsel for the depositors, is not one of a contract repudiated by the Government of the State, but one in which a defendant was seeking to screen himself from liability, because the contract which he made was with the Government subsequently overturned, and it clearly establishes the right of a State to claim the benefits of the act of a Government since overthrown. But it will hardly be insisted that every expenditure of that uprooted Government is of binding force upon the present State of Texas.

It is said the policy of courts is to restrict the effects of war

within the narrowest limits possible. This is not denied; but the disposition of courts is one thing, and their power, theoretically, at least, quite a different one. They may and ought to have the disposition to restrict, but it is not for them to fix the limit, when the political power has set a boundary for them.

The principle that there can be no interregnum is true in one sense. It is utterly misleading in the sense in which the counsel for the depositors uses it. It is true, courts and laws recognize *de facto* Governments, but it is not true at all that they are bound by the positive law of nations to abide by everything they do. It is a part of the law of England that a man, by adhering to a king *de facto*, does not incur the penalty of treason; but does that statute of Henry VIII go any further. It would be rather a more liberal construction than the law authorizes, to hold that by reason of this statute a nation was bound by any contract which a Government established for a day might make.

But it is said the bank is a mere trading corporation and not the State. I by no means admit this in the broad sense in which it is stated. But I do admit that the bank is a corporation, just to the extent that it is subject to suit, and it may make such contracts as the State has, by its charter, directed, or as it may by statute direct. Otherwise than for the purpose of suit, and of holding property, it is not separate from the State. It is a mere *State agency*, controlled by the State; its acts directed by the State; every act responds to the pulses of the State itself. Whenever the State is overthrown, the acts of the State are overthrown, and the acts of this agency, under the direction of the uprooted party in the State, go with the party. It was authorized by that party, and by that alone. If they prevail, the acts are valid; if they sink, the acts, as legal, binding acts, sink under the wave that submerges their author. The acts of their agent are not the acts of the lawful State bank; the contract is not hers. They may be the acts of the bank of that uprooted Government, but they are not the acts of the bank of that State Government which now stands upon the ruins of the

old. This is what the schedule of 1865 declares. This is what the act of 1866 (Feb. 16,) ch. 28, sec. 5, carries into the assignment.

The bank of Tennessee is as much the creature and agent of the State as if it was the Treasury itself; as much so as the Fiscus of the German States, where the Treasury is what we would call a corporation, subject to suit. Of course, such an ideal existence must have its legal existence with the Government of which it is part, and be subject to its fate. It is supposed that this argument is like that which was urged against the bank when it was first chartered, that it was not a valid corporation, because it had no individuals named as corporators. In truth, the view I take and that, are antipodal. I look exclusively at the substance, that stuck in the bark. I say the legislature might declare the *Treasury safe* subject to suit, or the Treasury, and it would be so. As to the bank, it sets apart a particular fund, and allows that fund to be reached by a suit in a particular form against the bank. But the suit is, in substance, against that particular fund of the State, and so far a suit against the State, in substance, but not in form. It is clothed with certain incidents appertaining to individuals by the law of its creation, but it has only a formal existence separate from the State. Subject the Treasury to suit, and it will separate to the same extent, nearly.

It is just on this point that the acts of the bank and those of individuals differ. Natural persons may, in a state of war, make contracts among themselves, which are binding and obligatory, without reference to who prevails in the contest, and such contracts cannot be disturbed; but where the validity of the obligation depends upon the power to make it, and the power to make it depends upon which party the war decides to be the Government, the principle to be applied differs *toto cælo*. Here, the case of White *v.* the State of Georgia is distinguished from the present case. That was a contract before the war, and valid. Of course, the war could not affect it, and the obligation not depending on the result of the war, the State could not pass any law to impair it, after the war was over. The distinction is between impairing the obligation of

a contract, and declaring a contract void for want of authority to make it.

Take the instance of the Franklin Government, and suppose it to have seized upon the trustee of one of the counties it had assumed to control, and had, through him, attempted to force the county into contracts; would North Carolina have been bound to respect such contracts, or was it at liberty to say such are not the contracts of the county, but only of your agents therein, and they are not binding?

War Bonds.

The war bonds are, of course, void, under the amended Constitution of the United States. (See Hanauer *v.* Woodruff, 15 Wall., 439.)

The policy of this repudiation by the requirement of the United States is not a matter of punishment, of *delictus*, but simply an exercise of the power in the successful party to disown the acts of the Government which has been overthrown. No man—however little he sympathized with the Confederate States, or how reluctant soever he might be to buy a bond—could recover on the bond, or the consideration he gave for it. That does not reach or affect the basis of the refusal. The prohibition is universal and indiscriminate. The prohibitions of a statute cannot be applied by the courts to A, and turned aside from B, when both are equally within its terms, because one is obnoxious to its policy, and the other is supposed to have acted from motives not within its policy.

Cases in Tennessee.

In the case of Williams *v.* The Register of W. Tenn., (Cooke, 217, 218, 219,) a case argued by Haywood, Whiteside, and Cooke, for plaintiff, and by Balch, for defendant, Overton, Judge, says: "This part of the Constitution, as to compelling the State to do an act which, in morality and justice, it ought to perform, must be viewed as a dead letter until some mode of proceeding shall be pointed out by the Legislature." As yet, no method has been pointed out.

"The obligation contracted by the State, * * * we have no doubt, the State is morally bound to comply with; but does the Constitution or the nature of our Government furnish the means to the judicial department to compel an observance of this contract in issuing a grant, when the State has expressly said it will not issue one. The State has, by its act of 1809, prohibited its officers from issuing a grant or grants on this warrant. Is it proper that the judicial department should order these officers to do an act that is forbidden? * * * Political considerations may interfere to prevent a State, temporarily, from discharging a moral obligation. * * * The court cannot but perceive that to grant a *mandamus* in this case would, in effect, sanction the idea that the State may be sued. * * * On general principles, the idea of an individual citizen or subject compelling the sovereign to do an act is repugnant to every idea of sovereignty. It is true, the Constitution has said the Legislature shall have power to provide a remedy. This, however, they have not done; and until it is done, it is not in the power of the court to do that to which the Legislature are competent. Suppose the State indebted to an individual, this court could not grant a *mandamus* compelling the treasurer to pay it."

"There is an obligation, morally speaking, but it is an imperfect one, and the Legislature has not thought it proper to give to the judicial department any power or means to compel the performance of it. Until the power shall be communicated, there can be no legal power whatever vested. For the purpose of administering justice, the Constitution has vested in the different departments certain powers. Each department has its province marked out, within which, as within their respective orbits, each must move without collision; then the Constitution will be preserved from destruction. An assumption of power by one branch of the Government, which properly belongs to another, weakens the main pillar on which it rests. By repeated acts of assumption, the fabric totters, falls, and with it all that is valuable.† * *

†See, to the same effect, Rhode Island *v.* Massachusetts, 12 Pet., 721-2.

It is the province of the judicial department to determine between man and man, and not between the State and its citizens, where there is no vested perfect right to a grant, legal or equitable. * * * With the view we now possess of this subject, the act of 1809 seems to be void, on account of its repugnance to the provisions of the Constitution, but this court cannot perceive that it possesses any physical power to compel the State to issue a grant."

The case of the Justices of Cannon County *v.* Hoodenpyle, (7 Hum., 146,) is a very instructive one on the subject of the power and jurisdiction of courts over public bodies, for which reason I quote the words of the opinion. That was an application for a *mandamus* to compel a County Court to levy a tax: "The power is given, granted to the justices, and not the duty imposed; within their limited sphere they have a discretion to exercise of the same character with that of the Legislature itself. They will inquire into the state of the debts of the county public, and into the means of the same public. It is their moral and political duty so to exercise this power as to preserve good faith, and to maintain the public credit in a healthful condition. If they omit to do this, the correction must be sought for among their constituency in enlightened and honest public sentiment. There is no principle upon which the judicial department can compel the exercise of this subordinate taxing power which would not justify the same mandatory supervision over the taxing power of the Legislature itself. *No one would claim this for the courts.* They have no more power to assess, or command the assessment of taxes, than the Legislature has to adjudge or to command the adjudication of law suits; and while the courts, as is their duty, shall firmly maintain themselves, with reference to the other departments, in the exclusive exercise of the judicial power, it becomes them to avoid encroaching upon the other departments of the Government in the discretionary exercise of political power. It would be a great evil, deeply to be deplored, if the Legislature should, at any time, fail to sustain the public faith and credit, by fully discharging the debts of the State. But that evil cannot be averted by the

courts awarding against them a peremptory *mandamus*, to assess taxes adequate to the payment of the public debt; because, to attempt this, would be going beyond the sphere in which judicial power is properly exercised. It is an evil of less magnitude, but still a great evil, for a county to omit to provide for the payment of its debts; but that evil cannot be corrected by compulsory steps, on the part of the courts, to enforce assessment of taxes. If, owing to the pressure of the times, the general embarrassment of the community, or the like cause, influencing the exercise of the taxing power by the County Court, they should abate the county assessment below the limits of their power, every creditor, for whatever sum, might, upon the principle upon which this *mandamus* was issued, file an application in the Circuit Court, ascertain his debt, and obtain his order on the County Court to levy a tax and pay his debt."

"But it is argued, very strenuously, that these relators are entitled to some remedy, and that there is no other remedy, except that furnished by *mandamus*. Many grievous wrongs may be imagined as possible to result from the exercise or non-exercise of political power, in the legislative and executive departments, which cannot find a remedy in the courts of justice."

J. B. Heiskell & Bro
of Tennessee

A Chronological statement of the State Legislation hostile to the Bank issue of 1861.

1st. The 1st and 2d sections of the act of 1831, in reference to the proceeding by *mandamus*, provide—

Sec. 1. "The Circuit Judges of this State shall have power to issue writs of *mandamus* upon petition supported by affidavit before any Judge or Justice of the Peace or any Clerk of the Circuit Court, under the same rules and regulations, and restrictions as in cases of injunction, or *certiorari* and *supersedeas*.

Sec. 2. "The writ shall be made returnable to the Circuit Court of the county where the land lies, in all cases where land is the subject of the controversy; and in all cases, to the Circuit Court of the county where the defendant or defendants in the writ may reside; or if against a public officer in the county in which his office is kept." Car. & Nich., Stat. 448.

2d. This statute was in force when the bank charter of 1838 was passed, in which we find this provision—

Section 12—

"That the bills and notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury, and by all tax collectors and other public officers, in all payments for taxes or other moneys due the State."

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3d. The new constitution of 1865, in section 6—schedule, declares—

"All laws, ordinances, and resolutions of the usurped State Government, passed on or after the 6 May, 1861, providing for the issuance of State bonds; also all notes of the Bank of Tennessee or any of its branches issued on or after the 6 May, 1861, and all debts created or contracted in the name of the State by said authority, are unconstitutional, null and void; and no legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

4th. The Act 10 June, 1865, (acts of 1865, p. 58,) in sec. 33, repeals the 12 sec., of the act of 1838, establishing the bank. And sec. 34 also repeals sec. 2,807 of the Code, which provides that "actions may be instituted against the State under the same rules and regulations that govern actions between private persons."

5th The Act 16 February, 1866, (see acts 1865-6, p.—) provides for the winding up and settling the business of the Bank of Tennessee. The 2d sec. enacts, that the "President and directors proceed with all dispatch in the collection of the debts due the bank and branches, and receive in payment United States currency or notes of the bank issued prior to 6 May, 1861, studiously refusing and excluding all issues or reissues after that date; also all the reissues made after 6 May, by G. C. Torbert or any of the officers of the principal bank, or any of its branches are utterly void."

This act further provides for an assignment by the bank, for the payment of certain preferred claims.

6th The act 28 February 1873 (acts of 1873 p.) enacts- "that no court in the State of Tennessee has or shall hereafter have, any power, jurisdiction or authority to

entertain any suit against the State or against any officer of the State, acting by authority of the State with a view to reach the State, its treasury funds or property, and all such suits now pending or hereafter brought, shall be dismissed as to the State or such officer, on motion plea or demurrer of the law officer of the State, or counsel employed by the State."

7th. The Act 21 March, 1873, (see Acts, p. ,) provides in the 1st section,—"That in all cases in which an officer, charged by law with the collection of revenue due the State, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed to be due by said officer, from any citizen, the party against whom the proceeding or step is taken, shall, if he conceive the same to be unjust, or illegal, or against any statute or clause of the constitution of the State, pay the same under protest, and upon his making said payment the officer or collector shall pay such revenue into the State treasury, giving notice at the time of payment to the comptroller that the same was paid under protest, and the party paying said revenue may at any time within thirty days after making said payment, and not longer thereafter, sue the said officer, having collected said sum, for the recovery thereof. And the same may be tried in any court having the jurisdiction of the amount and parties. And if it be determined that the same was wrongfully collected, as not being due from said party to the State for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded, and thereupon the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury."

Section 2 provides, "that there shall be no other

remedy in any case of the collection of revenue or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other or different funds than such as the tax payer may tender or claim the right to pay, than that above provided; and no writ for the prevention of the collection of any revenue claimed, or to hinder or delay the collection of the same, shall in any wise, either injunction, supersedeas, prohibition, or any other writ or process whatever. But in all cases, in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided and in no other manner."

Lastly, the act of March 25, 1873 (See act 1873, p.) provides—" that the several tax collectors shall receive in discharge of the taxes and other dues to the State, bank notes of the Bank of Tennessee known as the old issue, warrants on the treasury legally outstanding, gold, silver, national bank notes and nothing else. "

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE, EX REL. JAC. BLOOMSTEIN,

v.

THOMAS H. SNEED, TAX COLLECTOR.

J. B. HEISKELL, ATTORNEY GENERAL, FOR THE DEFENDANT.

In this cause, the State, whose name is somewhat incongruously used for the plaintiff, is the real defendant, and it is for the State that I appear, and I deny that the State or her officers is liable to the judgment sought here, for three reasons:

1st. That the remedy by *mandamus* does not lie to require an officer of the State to disobey a legislative mandate, either by the common law or by the law of Tennessee.

2d. That the courts of the State in which this suit was brought had no jurisdiction of the cause.

3d. That the usurped Government of 1861, from the time it arrayed itself against the United States, in armed resistance, 6th May, 1861, could not, directly or indirectly, impose upon the State any obligation or contract, and that the validity of all such attempts, if not all acts of such Government, depends upon a ratification of such act, either express, or implied from failing to repudiate them.

1st. The writ of *mandamus* does not lie to compel an officer to disobey a legislative mandate.

It is the peculiar province of the Legislature to deal with

questions of finance and revenue, and the sovereignty of the State, in this department of Government, is, in a peculiar sense, vested in the Legislature. To the Legislature, from time to time, is intrusted the making of all appropriations out of the public treasury, and, by our Constitution, no money can be drawn from the treasury except in consequence of appropriations made by law. To meet these appropriations, estimates are made, and the taxes of the State are regulated. It is therefore peculiarly a matter of legislative discretion how the officers of the revenue shall proceed in the conduct of their collections and payments into the treasury, as well as how the money, once in the treasury, shall be disbursed, and how far the courts will be allowed jurisdiction to interfere with this peculiar branch of the sovereignty of the State.

The law of the State of Tennessee is settled in the case of Williams *v.* The Register of West Tennessee, Cooke, 214, decided A. D. 1812, and never in any way questioned in the State, until now it is assailed by the counsel for the relator. That case, to my mind, settles, that, in matters peculiarly within the legislative control, as the disposition of the public lands, (and, by *parity* of reason, if not *a fortiori*, the collection and disbursement of the revenue,) the will of the Legislature is not to be controlled or interfered with by the courts, although the act of the Legislature may be obnoxious to the objection that it violates the State Constitution, which, in regard to the impairment of contracts, is the same as the Federal Constitution. In that case, the court say, "with the view we now possess of that subject, the act of 1809 *seems to be void on account of its repugnance to the Constitution.*" Revenue and taxes are peculiarly in the sphere of the legislative department of Government, and, in no well-regulated State, will the judiciary interfere with the exercise of the legislative will upon a subject so peculiarly within that department as this is. Perhaps no court has more properly appreciated the powers of the Legislature, or given them more admirable exposition, than this court in the case of Murray *v.* Hoboken Land & Improvement Co., 18 How., 272.

But this court has held that officers, to whom a discretion is confided, are not subject to any control by courts, in cases so numerous and consistent that it would be an affectation to cite them. The court of Tennessee, in Williams *v.* The Register, only held that, in matters peculiarly within the legislative power and control, they would not interfere by *mandamus*, where the Legislature had assumed to exercise the discretion itself, and had directed the officer not to exercise a given power.

This case also holds, as a question of State law affecting the jurisdiction of her own courts, that the suit against the officer was a suit against the State; and so the court had no jurisdiction. That doctrine, as the law of Tennessee, under her Constitution and laws, has never been questioned in any judicial utterance. It is recognized in the case at bar, and has been expressly made the ground of a decision in the case of Walters *v.* Morrow, Treasurer, decided at Knoxville, May Term, 1876, Ms. Of course, it will be said that this court holds a different doctrine in Osborne v. The United States, and other cases of that class, under the Constitution of the United States; but, clearly, each decision is conclusive, in regard to the matter to which it applies. If the courts of the State of Tennessee hold, in regard to their State Constitution, that a suit against the State means a suit against an officer of the State, with a view to reach not him, but the State, and that their jurisdiction is to be regulated by the substance, and not the form of the suit, I maintain that their construction of the State Constitution is as much binding on this court, as is the contrary holding of this court upon the construction of the 11th amendment to the Constitution of the United States obligatory upon them.

These points were settled by this decision long before the charter of the Bank of Tennessee was passed, and had not been denied in the holding of any court in that State at the time the charter was granted, or since; and they thereby become a rule of decision, not only in that court, but in this, under the ruling of this court in numerous cases.

At the time the charter was passed, it was then the law of Tennessee that no *mandamus* lay to compel a public officer to do an act prohibited by the Legislature, though by an act invalid as against the Constitution of the State and the United States.

It was the law of Tennessee, that a suit against a public officer, to compel him to an act to bind the State, was a suit against the State, within the provision of the State Constitution, as to suits against the State, whatever different holding may prevail as to similar clauses or phrases in the Constitutions of other States or of the United States.

It is, therefore, a case in which no *mandamus* lies in the name of the State to compel the State, by means of compulsion on its agents, by whom alone a State can act, to do what it has by its Legislature, acting peculiarly within its department, denied to its officers the authority to do.

In the case of Board of Liquidation *v.* McComb, 2 Otto, 531, the question involved was the jurisdiction of the *Circuit Courts* of the United States in injunction and *mandamus*, not the powers and jurisdiction of a State court. They depend, therefore, upon principles wholly different and authorities entirely dissimilar. That case came from a Circuit Court of the United States. No restriction in the law or decisions of Louisiana is intimated in the opinion; and if there were such, then the question still remains, how far such restriction would affect the equitable jurisdiction of the Federal courts? The present case comes from a State court, and involves the jurisdiction of that court, and in that class of cases State law alone is involved.

In the case of Davis *v.* Gray, 16 Wall., 220, the jurisdiction of a Circuit Court of the United States was involved and alone discussed and decided upon.

The case of Louisville and Nashville R. R. Co. *v.* The State, (8 Heis., 805,) upon full argument on both sides of the question, does decide that the power to *supersede* tax proceedings or to obstruct them by preventive measures, was not prohibited by the Constitution of the State guaranteeing the remedy by *certiorari*.

It is true, the same judge had previously delivered an opinion, in which he had overlooked the distinction between the remedies between citizens and between the State and its citizens, and between a *certiorari* and a *supersedeas*, which does not necessarily accompany the other writ.

In the other cases it will be found that no questions of jurisdiction are decided, and no question whether the State could be sued or not, was raised or determined.

No such authority existed at common law. It is an extraordinary remedy not grantable where there is any other common-law remedy. The tax-payer has the option to tender his alleged lawful medium of payment, and then refuse to pay further, and bring trespass for the illegal act, if it be illegal, of the officer distraining for the tax. The remedy by *mandamus* is somewhat like specific performance, if, indeed, it is not specific performance in its every essential, and that is not such a remedy as is within the protection of the Constitution of the United States. Certainly not so if there be any other ordinary remedy by the course of the common law.

In treating the subject of *mandamus*, Mr. Tapping says the court will not grant the writ if it will introduce confusion and disorder. * * * It will not require that to be done which is indecorous in its nature. So, a *mandamus* will not be granted to command any person to exercise a jurisdiction which that person is not most clearly and certainly appointed to and bound by law to exercise, for the court will not grant such a writ except it clearly see that there is a power lodged in the person against whom the *mandamus* is prayed.

Lord Denman, in Queen *v.* Powell, 4 Per. & Dav., 721, says "that there can be no *mandamus* to the sovereign, there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of *mandamus* is to be enforced by attachment."

"But then the prosecutor says that proceedings by *mandamus* being according to the general course of practice, if it cannot

be done by joining the sovereign, it must go against the steward alone. But the reason given by the court in the case of the steward of Whitford being that the interests of the lord ought to be protected, the crown is not to be excluded from the benefit of that protection, and its interests are as much to be guarded as that of a subject, and that whether the sovereign is to take the profits of the manor to his own use, or whether they are to be appropriated to the public service, * * * and if the interest of the crown cannot be so effectually protected by a writ against the steward alone, it is a very strong reason to show that such a writ cannot be sustained. * * * And, indeed, if we were to allow a *mandamus* to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the sovereign a party to the *mandamus*."

In R. *v.* In re De Bode, W. W. & H., 332, the court say: "But against the servants of the crown, as such, and merely to enforce the satisfaction of claims upon the crown, it is an established rule that a *mandamus* will not lie. I call this an established rule, and I believe it has never been broken in upon." Coleridge, J., then comments on The King *v.* The Lords of the Treasury, 4 Ad. & El., 286, and S. C., 1 Hart. & Wol., 533; 5 New & Man., 589, and says that while in that case on peculiar circumstances they directed a *mandamus* to go, "in so deciding they do not impliedly infringe, and they expressly affirmed the doctrine that a *mandamus* will not lie against the crown or its servants as such."

In R. *v.* The Com'rs of the Customs, 5 A. & E., 380, the application was for a *mandamus* to require commissioners of customs to deliver up property, on the allegation that the duties had all been tendered.

In the course of the argument, Littledale, J., asks: "Will a *mandamus* lie to the officer of the king?" And, on being answered that that was the simplest way, Patterson, J., says: "We should object to granting the writ, if not warranted." Littledale's opinion is: "I think we cannot here take into consideration the argument that there is no other remedy. The

goods are in the hands of the officers of the crown ; a *mandamus* to them would be like a *mandamus* to the crown, which we cannot grant." (382.)

See also High on Ext. Rem., 120, *et seq.;* id., 135 ; *ex parte* Echolls, 39 Ala., 698. See also 1 Ark., 571; 22 La., 1; 32 Me., 503; 4 Minn., 309.

The President, heads of departments, and the Governors of States are exempt from compulsion by *mandamus*, on account of their political and independent position. But it is by this proceeding sought to subject the Legislature, on a matter peculiarly within their department, to a controlling necessity which shall compel them to act. I maintain they cannot be subjected to coercion, directly or indirectly, in the matter of taxation and appropriation. To them is confided absolute discretion, free from control by the judiciary ; and the acts which they pass in this regard are subject to no revision and to no control. If the powers of the President or a Governor are political, so are the powers of the Legislature over taxation. If the Governor is an independent and co-ordinate branch of the Government, so is the Legislature eminently, in respect of taxation and revenue. They have certainly powers in regard to the control of the public treasury, and matters connected therewith, altogether distinct in nature and character from their legislative authority—law-making power. It is that regular law-making power which the courts have subjected to the judiciary, where one law, the higher constitutional law, conflicts with a lower legislative law. But it can have no application to such matters as are, by the fundamental distribution of the powers of the Government, vested in the Legislature. What the courts cannot do directly, they cannot reach by indirection. As said by the court in Marbury *v.* Madison, 1 Cr., 165: *The subjects are political* ; they respect the nation (state,) not individual rights, and being submitted to the executive, the decision of the executive is conclusive.

A supervisory control of one of the co-ordinate branches of the Government over the functions and duties of another branch, would necessarily diminish the responsibility of the branch whose functions were encroached upon. The more

distinct and independent the action of public functionaries, the stronger and more direct their responsibility. This ground of responsibility was doubtless one of the purposes aimed at by the framers of Government in the separation of powers.

Dennett, Petitioner, 32 Maine, 511, cites the case of Marbury *v.* Madison, 1 Cr., 137, and says: The opinion in that case states that "the province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court. All interference with the Executive Department is, in that case, expressly disclaimed."

These cases do clearly maintain the very doctrine as to the executive that Williams *v.* The Register maintains as to the legislative department.

Let me try to make myself understood. The Legislature has functions purely legislative, affecting the rule of conduct of individuals, in their contracts, in their relations, &c., but as they are within their law-making sphere in regard to regulations of individual rights, so in respect to those things which affect the State the subject is political, and their function is political; as to these, the act of the Legislature is no more subject to the interference of the judicial department than is the executive in the exercise of its political as distinguished from its ministerial functions. I maintain, then, that the legislative department, in its governing function, in its political capacity, exercises a function different in kind from its legislative or law-making power, as distinctly defined to the sense, when we come to examine it, as the difference between legislative and executive functions.

The grant of supplies, the right to make war and peace, and the supplying of the means of carrying on the Government, is a function essentially different from passing a statute of frauds, which forbids that one shall become bound for the debt of another without a writing. One is political, the other is not. I repeat, how shall it be that this doctrine, which is

universally recognized as to the executive department, is not to be applied to the legislative? How is it that the executive is conclusively to judge for himself, as to his constitutional obligations, and a legislative body, as to functions of the same character, is to have no such immunity? Now, that is precisely the doctrine that Williams *v.* The Register asserts; and it needs but to be understood, to challenge the acceptance of sound statesmanship and sound judicial reason.

If, then, the case at bar stood without this case, by which it antedates the contract, and had to stand here to-day upon its own inherent strength and weight, unquestionably it is right, and would prevail; but with that, as the unquestioned rule laid down, and never departed from for more than a quarter of a century before the charter of the bank was passed, there can be no doubt as to its effect.

Now, look for a moment at the effect of the proposed movement of which this case is the initiatory step. Here there is outstanding from $1,100,000 to $1,400,000 of this *new issue* in Tennessee. The Legislature makes its budget, and makes no provision for it. The Legislature is, politically and by the Constitution, the department to determine what revenue it will raise, and how it will disburse it. The judiciary have no power to coerce the Legislature in that behalf. But if this scheme succeeds, the $1,400,000 will be forced upon the treasury, and the Legislature will be (not left to the exercise of its political functions, according to its constitutional discretion) but coerced to act in that political capacity by the judiciary. In Tennessee the courts hold this cannot be done. In England they hold that such function cannot be subject to coercion in the executive head. In the Federal Government we hold the same. In the States we hold the same. But in Tennessee we have applied the same doctrine to the Legislature.

But it is said the remedy by *mandamus* was regulated by the act of 1831, and that is read and treated as if its particular application to this case was so defined as to make it part of the charter of the bank and of the contract with the State. On the contrary, the act of 1831, is simply an act to define where the jurisdiction of the cases in which *mandamus* lay was to be exercised—first, in Circuit Courts; and second, locally, in what particular Circuit Courts. That is the whole scope of the act. It is entitled, "An act to regulate the practice in cases of *mandamus*." (Sess. Acts, c. 51, p. 75.)

It in no manner affects the extent of the jurisdiction, nor confers jurisdiction in any case in which the common law did not give the jurisdiction, as the common law was held in Tennessee to be. It in no manner affects the decision in the case of Williams *v.* The Register, but vests the jurisdiction, subject to the restriction established in that case, in the courts mentioned.

2d. In the view that this is a question of the jurisdiction of a State court over a matter involving State policy and State revenue, I respectfully suggest that the action of the State court is entitled to the highest consideration, and as it is supported by a case decided long before the rights of these parties accrued, it becomes, under the rule of this court, in Gilpecke *v.* City of Dubuque, 1 Wall., 206, controlling and conclusive. But in the case of Adams *v.* City of Nashville, MS. Opinion, by Mr. Justice Hunt, November 5, 1877, the decision in the case reviewed, on a question of State law, was held to be authoritative.

But in another view, it seems to me this court cannot reverse the decision of the State court.

The jurisdiction of the courts of Tennessee was defined by the laws, including the repealing act of 1865, taking from the courts all right to entertain suits against the State. The Constitution of 1870 was passed, and it declared that "the jurisdiction of the Circuit, Chancery, and other inferior courts, shall be as now established by law, until changed by the Legislature." (Art. 6, sec. 8.) Under that Constitution, all

the judges in the State were elected, and inducted into office. With what jurisdiction? They were sworn to support that Constitution. Can it be said that, notwithstanding the withdrawal of jurisdiction of suits against the State, they still possessed the jurisdiction taken away? This court has held that there are certain acts of States which, however they may have the effect to violate contracts, they cannot obviate; as where a board of levee commissioners was abolished, this court held that no *mandamus* lay to them to act, though the effect of the abolition was to destroy a remedy. Now, the court could as well hold that the repeal of the levee boards was void as to previous contracts, as to hold that a withdrawal of jurisdiction was valid only *pro tanto*. The Constitution of Tennessee, of 1870, was, in effect, the abolition of the old courts, and the institution of new ones, and these new ones never had any jurisdiction but what they then acquired, and they acquired none by descent. Nothing but by the clause above quoted, and that is to be read as referring to the statutes of the State, not as those statutes might be varied by matter *in pais;* not as established by law, except as to certain cases not known to the makers of the Constitution.

But as to the Supreme Court of Tennessee, from which this appeal comes, it, was wholly reconstituted, and its jurisdiction could not, upon its new creation, have any aid from its predecessor. If an act taking away jurisdiction might be held void, which I deny as to the very court from which it is taken, then it must still be unquestionable that a new court constituted in lieu of that one, and upon which that jurisdiction never was conferred, could not, by virtue of any provision in the Constitution of the United States, have a jurisdiction which the law never gave. Whatever extension may be given to the doctrine that remedies cannot be repealed, the Constitution of the United States and construction by this court can never go to the length that a court which never had the jurisdiction to do a particular thing can have it actively conferred by construction and judicial interposition of this court. This would be utterly inconsistent with the decisions of this court, and

with the whole principle upon which acts of State Legislatures are annulled or restricted in their operation.

Constitution of Tennessee, art. 6, § 2:

"The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State.

"The judges shall designate one of their own number, who shall preside as chief justice.

"The concurrence of three judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only under such restrictions and regulations as may from time to time be prescribed by law, but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court."

This last clause is an extract from the Constitution of 1834, intended to preserve some original or peculiar jurisdiction, the history of which seems to be lost to the profession, as it has been held that the Constitution of 1834 deprived the court of all original jurisdiction (Miller *v.* Conlee, 5 Sneed, 434.)

3. As to the power of the government of 1861 to bind the State.

In the somewhat complex relations of our States and of the United States, it is difficult to obtain a clear view, or to present clearly the effect of a collision of arms and of revolution in a State.

Since the argument in the State court, the history of the country has suggested cases which may serve to resolve these questions into their simplest elements. Suppose, then, that two parties in a State, each claiming to be the legitimate government, shall organize each all the essential elements of a complete State Government, and each exercise the function under pre-existing laws of making contracts, or issuing bonds in the name of the State? Or suppose each shall grant the same land to different grantees, or the same exclusive franchises to different corporations? Now, when the issue is settled, which of these is the true government, by the success and permanent establishment of one of these contending par-

ties, which contract, which bond, which grant for land or franchise will prevail? They cannot both be valid and obligatory. The victorious government may adopt acts of the subjugated party, but that is a different consideration. Only one set of these acts are valid *per se*. Which? Certainly those of the party which turns out to be the State.

But the acts of secession of 1861 complicated this simple question by bringing into it the relation of the Federal Government and the civil war in the States. A party existed in Tennessee which asserted from the beginning the nullity of the act of secession, and the other States, from the date of that measure, regarded the acts of the Government of 1861 as null and void. From that time the issue was in process of settlement by wager of battle; and previous to 1865 that issue was determined by the victory of the Federal arms, and the State Government of 1865 established on a firm basis. Now, my theory is, that from the time the Government of 1861 assumed the attitude of resistance, it became incapable of binding the State to any contract, or of imposing upon the State any obligation which the State, when it came to its own again, was bound to submit to as its own contract and obligation. What may be the usage of modern nations in respecting acts of revolutionary and provisional governments is not the question. It is simply, Is the victorious party in a civil war bound to submit to the contracts and obligations assumed by the subjugated party in the name of the State as obligations and contracts of the State? I submit, then, that the acts of the Government of 1861, by which that Government undertook to bind the State, were never binding on the State as reconstructed and reorganized in 1865, that being the only Government that had possessed the authority to bind the State; in other words, that being the State.

Now much is said about government *de facto* and officers *de facto*. Undoubtedly, in matters indifferent to the body politic, and, especially, in all matters which it is the interest of the State to leave undisturbed, the usage of nations is to regard them as being valid; and the relator's brief abounds in such cases, and on this subject it cites no others. I cheer-

fully concede the law to be that all such acts are valid, either of themselves, by a sort of implied recognition, or become so by the failure of the successful party to repudiate them. Upon which leg the matter stands is a mere matter of theory, and of no consequence in practice. I concede further, that, as to indifferent contracts of individuals *inter sese*, there is no principle that affects their validity because the nation is in war, civil or international. But, as I have shown above, the rightful Government can alone bind the State; and, in a civil war, that is the rightful which is established. I maintain, then, that, from the 6th of May, 1861, the Government of 1861 could impose no obligation upon the State. The United States have not only recognized this doctrine of the want of power to bind, but they have, by the 14th amendment, sec. 4, restricted the power of the States to ratify certain of these contracts, wherever they are directly connected with the levying of war. If these were contracts of a *de facto* government, (and the contracts of a *de facto* government are binding on a *de jure* government afterwards established by the issue of war,) then the United States have done a most unjust act in compelling States to repudiate obligatory contracts imposed by due authority. If, on the contrary, the theory is the true one, that the State is not bound by any contract of a usurpation temporarily in possession of the powers of the State, then the amendment is a just discrimination and restriction, which allows the State to exercise its own discretion in ratifying and adopting such contracts as have been made for proper objects, and prohibiting any ratification of such as were for resistance of the National Governments.

I repeat, if the *de facto* Government of a State has power to bind the State, it must, in virtue of its *de facto* sovereignty, be the judge of what it shall bind the State for; and what it decides to bind it for cannot be held to be subject to those rules which courts apply to contracts against public policy. The power to bind exists, or it does not. It does not exist in part, and non-exist in part.

The case of Howe *v.* Lockhart, 17 Wall., 580, holds that a law of Alabama directing investments in Confederate bonds

was void as being "a direct contribution to the resources of the Confederate Government. It is true, the court *arguendo* state briefly the general proposition, that other laws are to be regarded as valid, but whether by virtue of their implied adoption and recognition they do not say.

In the case of Huntingdon *v.* Texas, 16 Wall., 402, there was no act by the reconstructed State in any manner rebutting the implied approval of the issue of the bonds, and so no fact to raise the question whether the act was valid *per se*, or by reason of an implied ratification. I admit, the language is strong, but it is not a *decision* upon the point now raised.

Sprott *v.* U. S., 20 Wall., 464, was a case involving a claim to cotton under the Confederate States, and did not involve the question of the powers of the States. Its general statements are, therefore, to be taken as other *obiter dicta* on matters aside from the point in issue.

United States *v.* Insurance Cos., 22 Wall., 102, contains a review of all the cases. It will be seen that the first of the cases, 7 Wall., 700, as cited in 22 Wall., shows that Chief Justice Chase, in his opinion, does not pretend to speak accurately, but prefaces his remarks with, "It may be stated perhaps, with sufficient accuracy," &c., showing that the court was not upon these matters, considering the point now in controversy.

In all the cases, then, decided by this court, and cited by the relator's counsel, there is not one that decides upon a state of facts involving the principle of this case.

It is merely, in effect, a holding that, in the absence of a repudiating act, the courts will only condemn such acts as they can themselves see that it is the duty and policy of the State not to ratify.

But this case is subject to another complication. The Bank of Tennessee was a corporation of which the State was the sole stockholder, and, as such corporation, it stood in a relation to the State which is not of the simplest character. In one sense, it was a person with certain powers, with certain property which it had the right to bind or dispose of, subject to sue and

be sued, and to be governed by a directory established by the State and appointed by the Legislature.

In another sense, this bank was merely a fiscal agency of the State, as much so as a treasury department incorporated and made subject to suit. It received and kept all the State revenue, and all the business of the treasury was done through the agency of the bank, the treasurer receiving nothing and paying out nothing.

A view of this institution, which considers and regards it as a mere corporation managed by a directory, without considering its other aspect, will be misleading and tend to erroneous conclusions. (See extract from brief in Supreme Court of Tennessee.)

The courts of Tennessee have regarded it in both aspects. When they decided the case of Atchison & Duncan against the bank, they treated the bank as a corporation disposing of its own assets, and binding its own effects. It seemed to me that even there they might have looked deeper and seen by its relation to the State that it was to share the fate of the Government that controlled it. But the court thought otherwise, and that decision is subject to no review. But when the case came to be presented in view of the right of the bank to bind the State, they held that while the Government of 1861 could not directly bind the *State*; so, that the bank, while in the control of that Government of 1861, could not bind the State by indirection. (See Rec., p. 150, for opinion.)

Now, let us resort to comparison again for a moment. Suppose the Dorr Government in Rhode Island to have found a State Bank there, which it was the right of the State to control, and whose issues the State guaranteed. Suppose that Dorr seized upon it and compelled it to issue circulating notes for his war purposes; and suppose him to have afterwards been put down and the Government re-established; passing the question of the right of the bank to repudiate her issue, would any one pretend that the State would be bound as guarantor upon such issue?

But in this case it is said no such thing took place, the bank used old issues for these unlawful purposes, and the new

issues was only used for lawful purposes. The *State*, the real State, was, as we have seen, bound by no act of the Government of 1861, and by no act of the bank under its manipulation for war purposes, and it had the right to repudiate all its acts during the control of the Government of 1861. But its acts could be distinguished with accuracy only as to the notes issued by the bank while under that unlawful control. The State when restored, therefore, impliedly adopted the issues outstanding or reissued, but refused to recognize that so unlawfully issued, so far as it was distinguishable by date or by the signature of the President, Torbett, who came in three days after the ordinance of separation.

But it is said there is nothing to condemn these issues, as being issued to aid the war. To return to the illustration of the Dorr Rebellion. Suppose, instead of compelling the bank to issue new notes, he had simply seized and used the assets and effects, and the bank, while he still held control over it, had proceeded to issue the new notes, could this indirection affect the fact that it was by his act that the new liability was to be saddled on the State? While we are not able to trace the new issues of the bank into the war bonds, $4,625,000 of which the bank took, issuing its notes therefor, we do show an absorption of that much by the military commissioners of the State, and that this appropriation of the old issues led to the necessity of the new issues is unquestionable. Whether this was designed to avoid the consequence of illegality, or whether it was merely the natural consequence of the precedent facts can in my view make no difference. If Dorr had, when he seized upon his supposed bank, directed his directory to issue new notes for ordinary purposes, and had seized only upon the old and existing issues, he could not by that device have avoided the consequence that the supposed contract resulting from the issue of such notes would not bind the State. The form in which this thing was done, was not of the essence of it. If, without any caution to his directors he seized the funds which were in the bank for reissue, and the new issue merely re-

sulted as the natural consequence, the legal effect would be the same.

It is said, however, that the issue was not abnormal or excessive, measuring by other years. In statistics general average may be a matter of great importance, but in a question like this each period must afford the measure of its own needs and requirements. The bank had, and issued to the military board $4,625,000. The legitimate business of the bank in this state of things, called for the additional issue of $1,469,000. Suppose that $4\frac{3}{4}$ millions had remained in the bank: where would have been the need of this new issue? If we are to derive anything from the condition of affairs, why do we turn from that which existed then to what existed the year before, and the year before that, to see what is clear from the present time and its lessons. The exigencies of 1861 are measured by an issue of $1\frac{1}{2}$ millions, after a subtraction of $4\frac{3}{4}$ millions, for purposes admitted to be illegal. The $4\frac{3}{4}$ millions therefore in hand, as compared with this $1\frac{1}{2}$, afford the measure of the needs of that time. If the $4\frac{3}{4}$ had remained, would they have supplied the $1\frac{1}{2}$ or not is a question of fact.

There is no question here of innocent holder for value. History supplied the notice to all persons who dealt in these supposed securities, of all the facts necessary to put them on their guard as to their validity, and they must be treated as purchasers with notice. This applies to all persons dealing with the bank at the time these notes were being issued, as they must be charged with knowledge of passing public events.

Extract from the Brief of Hon. W. F. Cooper, in the Supreme Court of Tennessee.

My first position in regard to these claims is, that they were void in their inception, if the lawful Government chose so to treat them, and that the political departments of both the State and General Government have chosen so to treat them, and the courts cannot go behind their action.

The people of the State of Tennessee undertook to separate from the United States and join the Confederate States. This was accomplished, as far as it could be done, by the act of separation, and the legislation of the 6th of May, 1861, and the effect of what was done was to bring the State, as then controlled, and especially its legislative and executive branches, and the Bank of Tennessee, as their fiscal agent, into rebellion and war with the United States. It has been repeatedly decided by the courts of the United States that war is a state of facts, and needs no proclamation of the President or act of Congress to establish it; but that if anything was needed, it was supplied by the President's proclamation of the 15th of April, 1861, declaring the existence of an insurrection. (The Prize Cases, 2 Black, 635; Lawrence's Wheat., 535.)

"As a civil war," says the Supreme Court of the United States, in the Prize Cases, "is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know."

"All persons residing within this [insurrectionary] territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

In the case of *Luther* v. *Borden*, (7 How., 1,) the Supreme Court of the United States held that the same principles and rights applied to a rebellion within a State, where a new (or illegal) Government undertakes to overthrow an old (or legal) Government. The Legislature of the old Government had in that case established martial law, and Chief Justice Taney, in delivering the opinion of the court, observed, among other things, that "if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which we can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself, and overcome the unlawful opposition."

This language is quoted by Nelson, J., in his opinion in the prize cases, with approbation.

Now, what was the effect of the status brought about by the acts of the rebellious government in this State, on the 6th of May, 1861, and afterwards, until the lawful authority was restored, upon the acts of the rebellious Government with its citizens, and upon the acts of the citizens as between themselves? It is upon the answer to this question that the correctness of our first position must, in a great measure, depend.

Here is what Chief Justice Taney says on the subject, in *Luther* v. *Borden*, (7 How., 1, 39,) and he is borne out by all the elementary text writers:

"The laws passed by its Legislature during that time (during the time a State is in rebellion) were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of all its courts in civil and criminal cases null and void, and the officers who carried the decisions into operation answerable as trespassers, if not in some cases as criminals."

"It rests," he says, "with the political power of a State to pronounce upon the legality or illegality of the government acting for the time being.

"Moreover," he adds, "the Constitution of the United

States, as far as it has provided for an emergency of the kind, and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." (7 How., 42.)

The Dorr rebellion of Rhode Island, which was the particular rebellion under consideration, was not a rebellion of a part of the State against the whole. It was a rebellion of the whole State, by holding conventions, elected by, it was claimed, a majority of the people, and by a Legislature chosen in like manner, and its successful and continued organization would, as Chief Justice Taney said, have made the acts of the old Government illegal and void. It is the political department of the Government that survives the rebellion, without reference to the abstract question of right or wrong, which is clothed with the power "to pronounce upon the legality or illegality of the Government acting for the time being." And this, whether the rebellion be of a whole State, as in the case just mentioned, or of a part of a State, as in the case of the Franklin Government, presently to be noticed, and whether the rebellion continue, as in both these instances, only for a few months, or for only two or three years, as in the case of our own rebel State Government, or for twenty years, as in England during the great revolution, which ended with the Protectorate of Cromwell.

To the same effect as *Luther* v. *Borden* is one of our own early cases, *Ingram* v. *Cocke*, 1 Tenn., 19, in relation to the acts of the Franklin Government. The court say, in that case: "When Governments *de facto* cease to exist, the former or legitimate Government, by their legislative acts, usually furnish the grounds upon which municipal courts proceed in giving an opinion." In other words, to use the language of the Supreme Court of the United States, *White* v. *Hart*, 13 Wall., 651, "the result (to the rebel citizen) depends upon the rule, as defined in the law of the sovereign against whom he has offended." The action of the political department under which the judges hold their offices, upon anything done pending the rebellion, is conclusive upon the courts.

(See also *Rose* v. *Himely*, 4 Cr., 273; 3 Wheat., 324, 364; 13 Pet., 420; *White* v. *Hart*, 13 Wall., 649.)

By turning to Mr. Meigs's Digest, § 988, it will be seen that the Franklin Government adopted a constitution on the 14th of December, 1784, and ceased to exist about September, 1787. It will be seen, also, that the Legislature of Tennessee passed several acts, from time to time, validating proceedings under the Franklin Government, such as the granting of letters of administration, probate of instruments, and even marriages. Some of these acts are cited by Judge Haywood, in delivering the opinion in *Townsend* v. *Townsend*, Peck, 1, as retrospective laws which were valid.

The right of confiscation by the successful belligerent may be referred to in this connection. "The question of what shall be done with enemy's property," says Chancellor Kent, "is one rather of policy than of law, and is one properly addressed to the consideration of the Legislature, and not to the courts." (1 Kent's Comm., 60.)

"Respecting the power of Government (to confiscate enemy's property,)" said Marshall, Chief Justice, "no doubt is entertained. That war gives the full right to take persons, and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and, when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will." (*Brown* v. *United States*, 8 Cr., 110, 143.)

This doctrine was applied in all its rigor, without reference to their personal loyalty or disloyalty, to the citizens of the Confederate States, as enemies, in *Miller* v. *United States*, 11 Wall., 268.

I do not understand that there is any conflict of authority on these two points; that it belongs to the political department of the successful Government to say what laws and what acts of the rebellious Government, or of its citizens, shall be valid or invalid, and to determine whether any and what

property of the rebels shall be confiscated or destroyed, and that, in the language of Chief Justice Marshall, "the judicial department must give effect to its will."

With these principles distinctly before us, let us see now what has been done in the premises by the political departments of the State and United States Governments.

The fifth section to the schedule to the constitutional amendments, passed in February, 1865, while the war was still flagrant, by a convention and under a State Government recognized by the Government of the United States, provides: "All laws, ordinances, and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State Government, after the declared independence of the State of Tennessee, on or after the 6th of May, 1861, are unconstitutional, null, and void from the beginning," with a proviso in favor of judicial decisions made pursuant to the laws enacted previous to that date, and between parties in court and litigating their rights.

Section sixth is: "All laws, ordinances, and resolutions of the usurped State Government, passed on or after the 6th day of May, 1861, providing for the issuance of State bonds, also all notes of the Bank of Tennessee, or any of its branches, issued on or after the 6th of May, 1861, and all debts contracted in the name of the State by said authority, are unconstitutional, null, and void; and no Legislature shall hereafter have power to pass any act authorizing the payment of said bonds or debts, or providing for the redemption of said notes."

The act of the Legislature of the 16th of February, 1866, chap. 28, provides for the winding up of the Bank of Tennessee, and directs an assignment to be made to secure, first, the school fund, and second, the remaining creditors of said bank, "excluding all claims and demands of all kinds after the 6th of May, 1861, as absolutely null and void."

By the joint resolution of Congress of the 24th of July, 1866, restoring Tennessee to its rights in the Union, the adoption of the constitutional amendments whereby "all ordinances and laws of secession, and debts contracted under the

same, are declared void," is referred to, and made the ground in part of the restoration of the State to its rights.

And by the fourth section of the fourteenth amendment to the Constitution of the United States it is declared that "all debts, obligations, and claims incurred in aid of insurrection and rebellion against the United States shall be held illegal and void," and the United States and any State are forbid to assume or pay the same.

The sixth section of the schedule to the constitutional amendments of 1865, expressly designates the new issue of the Bank of Tennessee as illegal and void, and also the claims of the depositors of the bank by deposits made after the 6th of May, 1861, if such claims are, as contended for on the other side, debts of the State. And the act of the Legislature of the 16th of February, 1866, expressly puts the seal of condemnation on the claims of these depositors. This was an act of the political department of the Government shortly after the State had again come under the control of a loyal Government, and before the proclamation of the President of the United States, which declared the insurrection in Tennessee to be at an end. And whether he construe the act as the exercise of the war power of confiscation, or as a legitimate designation of the invalidity of certain acts for the guidance of the courts, is immaterial. In either event, it was within the competency of the political department of the Government, and conclusive on the courts.

The effect of the constitutional amendments of 1865 was to designate as void all laws, etc., passed after the 6th of May, 1861, but impliedly to leave all previous laws in full force and effect, and to validate everything done under them. So the designation of certain particulars as void by the 6th section in like manner left the courts to infer that they might treat as valid everything not thus specially designated. And inasmuch as every act of the rebellious Government, or its subjects, was, as we have seen, illegal and void at the option of the legitimate Government, the schedules to the Constitution of 1865 were more merciful than could have been reasonably expected from a victorious Government. Whether the

selection of the acts to be treated as void was wise, or just, or proper, was for the political department to determine. This action of the political department of the successful State Government was, in effect, sanctioned by the political department of the United States Government, both by recognizing the State Government, and afterwards by the resolution of Congress of the 24th of July, 1866.

The schedules to the Constitution of 1865 and the act of the Legislature of the 16th of February, 1866, are not, in this view, attempts to impair the obligation of contracts, which is the argument on the other side, and which we concede cannot be done, but are legitimate acts of the political departments of the State and United States Governments, strictly within their competency, designating, among the various proceedings which took place during the rebellion, and all of which were illegal and invalid, so far as the legitimate Government was concerned, such of them as should be treated as void, and impliedly validating all others, thus giving the courts, in the language of our Supreme Court in *Ingram* v. *Cocke*, 1 Tenn., 19, "the ground upon which they should proceed."

We agree that the annulling of a valid contract by subsequent legislative act or constitutional amendment would be void, because in conflict with that provision of the Constitution of the United States which prohibits the impairing of the obligation of a contract. But that provision of the Constitution can certainly have no application to contracts entered into under a usurped Government, by and between persons in insurrection and rebellion; and, *a fortiori*, to contracts between the usurped and rebellious Government itself, through its fiscal agent and its rebel subjects. All such so-called contracts are at the mercy of the legitimate Government, when restored. It is for the political department of the Government to say how they shall be treated by the courts. The rights of the rebel States and their citizens under the Constitution were, as said by the Supreme Court of the United States in *White* v. *Hart*, 13 Wall., 651, "suspended," and the extent of the punishment, either of person or property, depended upon the rule as defined in the law of the offended

sovereign. Those States, as said by the same court, on the same page, were at no time out of the pale of the Union. Their citizens had not the rights, therefore, of a foreign enemy who has been subjugated, but only such rights as the offended sovereign might see proper to extend to them.

The learned Chancellor, in his opinion in the court below, seemed to think that there was a distinction between contracts entered into under ordinances and laws of secession, or directly with the rebel authorities or agents, and contracts between private citizens, and that the ban of invalidity could only be predicated of the former. But I do not understand that any such line of distinction exists. By the rebellion, those who became parties to it, either voluntarily or through coercion of circumstances, are placed at once out of the pale of the law; and everything they may do, either with their rebel Government or between themselves, is tainted with illegality, and void, if the legitimate Government chooses so to treat it through the action of its political department. Of course, modern usages do not ordinarily result in such indiscriminate condemnation of all acts, public and private. But, to use the language of C. J. Marshall, already quoted: "The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will, more or less, affect the exercise of this right, but cannot impair the right itself." And certainly no just complaint can be made upon the score of the unmerciful exercise of the right in this State. The condemnation was limited to a class of claims which, to say the least, were open to grave suspicion, if not clearly guilty of direct aid to the rebellion.

Moreover, even if the obligation suggested were well founded, it could have no application to the "new issue" of the Bank of Tennessee. That issue may be literally said to have been put into circulation "under the ordinances and laws" of the rebellious State Government. Except for the fact that four millions of State bonds were authorized by that Government to be issued for war purposes, and that a Military Board was organized to arm and equip troops, and purchase military stores in aid of the rebellion, and the bank, as

the property and fiscal agent of the State, was required to lend its assistance, and did so lend it with full knowledge on the part of its officers of the unlawful purpose, not a dollar of the "new issue" and less of the "old issue" would have been used. If, in order to stamp this "new issue" with illegality, it should be deemed necessary that it should owe its issuance to a law or ordinance of secession, and to the direct act of the rebel authorities, these are not wanting. Any person who dealt directly with the bank during that period dealt with the rebel State Government, just as much so, under the proof, as if it had dealt directly with the Military Board or the Governor or the Treasurer of the State. The legislation of May, 1861, changed the character of the institution from that of a bank for ordinary banking purposes to that of a fiscal agent of a formidable rebellion. It is too weak a phrase to say that the bank was the right arm of the rebel State Government—it was the Government itself, and its every act was the act of that Government. As well might you attempt to shield from the charge of illegality acts of the Military Board, because those acts were between private citizens, as the acts of the Bank of Tennessee. And no one will pretend that the acts of the rebel Government and all its branches and agents were not void. (See *U. S.* v. *Keehler*, 9 Wall., 83; *Hickman* v. *Jones*, 9 Wall., 193.)

My argument, let it be distinctly understood, does not call in question any decision of this court heretofore made. It concedes their correctness to the full extent to which they have gone. For, while I contend that all acts of the rebel Government and of its citizens, while in rebellion, were illegal and void, because done without the pale of the Constitution and laws, from which they had withdrawn, I concede that all of those acts were amnestied and validated by the action of the political department of the United States, and of the lawful State Government, except those specially excepted, and except, also, such as were, in their very nature, treasonable, and therefore void. I may concede, also, that ordinary contracts between individuals, not made with the rebel authorties or their agents, and not tainted with illegality by their very

nature, are ordinarily considered as validated by the silence of the conquering Government in regard to them. The courts would feel at liberty to treat such contracts as valid by the modern usages of war, unless specially directed by the political department of their own Government to treat them otherwise. This is the only case which has come before this court where the act brought in question was the direct act, as we contend, of the rebel State Government, and positively declared to be illegal and void by the political department of the loyal State Government, and, as we insist, also, by the political department of the United States Government. It raises, therefore, a question not heretofore brought before the court in reference to acts and contracts done and entered into pending the civil war, and that is, whether the action of the political department of the Government, in regard to any such acts and contracts, is not conclusive upon the courts. My argument is based upon the conclusiveness of such action.

But, it may be said, the schedule to the constitutional amendment is abrogated by Article 11, section 1, of the Constitution of 1870. That section is in these words: "All laws and ordinances now in force and in use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature; but ordinances contained in any former Constitution, or schedule thereto, are hereby abrogated."

The language is, "ordinances contained in any former *Constitution or schedule thereto.*" Are the constitutional amendments of 1865 a constitution, within the meaning of the section? And are the provisions of the schedule which we have been commenting on, ordinances, within the meaning of the section?

These are, perhaps, hypercritical questions, which it is scarcely necessary to answer. The abrogation of the 5th and 6th sections of the amendments of 1865 would not have the effect supposed. The provisions of those sections did not annul the laws, ordinances, acts, and proceedings specially mentioned. They were illegal and void before. The true effect of these sections was, by implication, as we have seen,

to validate all acts done during the rebellion, except the acts set apart and designated. As to them, it was a direction for the guidance of the courts, that they alone were to be treated as void *ab initio*. The abrogation of the sections may invalidate what was impliedly validated thereby, but it cannot render that valid which was, from the beginning, void.

Besides, the provision of the new Constitution does not abrogate the act of the Legislature of the 16th of February, 1866, nor the resolution of Congress restoring Tennessee to its rights. It did not require a constitutional amendment or ordinance to express the will of the political department of the State Government on the subject. An act of the Legislature was equally efficacious. And this act, if the point be at all material, was passed before the 2d of April, 1866, when the President of the United States officially announced, by proclamation, that the insurrection in Tennessee was at an end.

It is obvious, therefore, that the abrogation mentioned can have no effect upon the question we have been discussing.

If we are right in our argument, the courts have no option, except to pronounce the claims under consideration illegal and void, leaving the parties to apply to the Legislature for redress.

The question of the illegality of the claims of these depositors growing out of the facts which have been introduced in regard to the "new issue," does not arise as the record now stands. The case of the depositors comes up on demurrer, and, of course, no evidence has been taken on this point.

If we are wrong in our argument, the question still remains, so far as the "new issue" is concerned, whether it is not illegal and void, because, as a matter of fact, issued in aid of the rebellion, and under the fourth section of the fourteenth amendment to the Constitution of the United States.

The proof is, that a military board was established on the 24th of April, 1861, by the rebellious State Government, for the purpose of arming and equipping troops, and purchasing military stores in the war then flagrant between the United States and the rebellious States; that this board drew from

the Bank of Tennessee, and used for the purposes aforesaid, in the year 1861, the sum of $4,625,460.48, the president, cashier, and other officers and directors of the Bank of Tennessee knowing at the time that the military board was organized to aid the rebellion, and that the money drawn from the bank by the board was to be used, and was used, for this purpose. It further appears that the "new issue" was put into circulation by the bank after the 6th of May, 1861, and in order to meet the demands of its regular business and of the military board. The charter of the Bank of Tennessee shows that the bank belonged exclusively to the State, and was its fiscal agent. The court, moreover, knows judicially that the State joined the other Confederate States in rebellion, and that all its resources were used by the rebel State Government for the purpose of aiding the rebellion, and that the Bank of Tennessee was especially made an instrument to this end.

The statement of the business of the bank in 1861, in connection with the demands made upon it by the military board, shows that the new issue was put into circulation to meet the extra demand for currency occasioned by the calls of that board. The drafts of the board and of the rebel State Government are far more than enough to cover the new issue. No amount of testimony could make it plainer that the bank was forced to resort to the new issue by the draft upon its resources for war purposes. If so, it is obvious, that being issued for illegal purposes, they are void, in whosesoever hands they may come. (*Thomas* v. *Richmond*, 12 Wall., 349; *Hanauer* v. *Doane*, 12 Wall., 342; 2 South. Review, p. 73.)

The argument against this view is, that some of the business of the bank in 1861 being of the usual character, it is impossible to distinguish between the legal acts and the illegal, and that the doubt will inure to the advantage of the holder. But, as matter of fact by the evidence, the "new issue" must be taken to have been put in circulation solely by the pressure on the bank occasioned by the demands of the military board and the rebel Government. No doubt some of the old issue, which otherwise would have lain in the vaults, was used on account of the same pressure. The old issue thus

used cannot be identified; the new can. *It is not the consideration upon which it was actually issued that constitutes its illegality.* Some Confederate money may have been issued to buy food for women and children. It is the fact that the money was issued at all, that makes it illegal—its use being shown to have arisen by reason of the exigency of the war. No one could contend that Confederate money was not void as between the holder and the maker, the Confederate Government, although it may have been issued, in some instances, upon an innocent consideration, and may have constituted a good consideration in contracts between individuals. So, we insist, that no matter what may have been the actual consideration for the issuance of any part of it, the "new issue" is illegal as between the holder and the bank as the fiscal agent of the rebel State Government. (See *Thorington* v. *Smith*, 8 Wall., 1, 11, as commented on in *Noff* v. *Crawford*, 1 Heisk., 123.)

And even in the most favorable view for the note-holder, it is a case of "partial illegality." But "partial illegality" is as fatal as "total illegality." (See Mr. Daniel's article in 2 South. Review, p. 85, where the authorities are collected.)

If, under the circumstances, it were material to show the nature of the particular transaction in which the notes were put into circulation, there is enough in the record to make out a *prima facie* case of illegality, and to throw the burden upon the holder.

It is difficult, moreover, to see how the "new issue" can escape the sweeping provision of the 4th section of the fourteenth amendment. That provision is: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, * * *; but all such debts, obligations and claims shall be held illegal and void." And whether this prohibition is to be considered as restricted to "debts, obligations and claims" of States, or is extended to such debts, etc., between individuals, is immaterial.

Extract from Brief of J. B. Heiskell, in Supreme Court of Tennessee.

CONSTITUTION OF THE UNITED STATES—CONTRACTS.

Into all this, the Constitution of the United States affecting contracts, does not enter. Suppose a suit was brought between two parties in a municipal corporation, to determine which is the proper authority, and pending the suit each party claims to act and does act for the municipality, when the suit comes to be decided, and this court comes to hold that one party was the rightful party, and the others had no claim of right to bind the corporation, does it impair the obligation of contracts? No more does it impair the obligation of contracts, than it does when it declares that my attorney in fact, who has made a contract *ultra vires*, has not bound me. Now, a civil war is but a grander *lis*, a wager of battle. When this is decided, and one of the parties to it declares that the other was never the rightful Government, it is not the impairing of contracts which happens, but it is a mere declaration of the result—that the overthrown Government had no authority to make the contract.

But it is said that the State must take all the contracts of the Bank of Tennessee or none. I deny that any such condition is imposed by the laws of nations upon States. When the United States sued in the courts of Great Britain for the funds of the Confederate States in the hands of British subjects or residents, did Great Britain or her courts stop to ask whether the United States intended to pay all the debts of the Confederate States? By no means. Did she even require her to apply any portion of the funds to pay the British creditors of the Confederate Government? Not at all. This is a precedent of the highest authority for our guidance here. The present State Government can recover the debts of the late State Government, without subjecting herself to any conditions whatever. So she can claim the benefit of any contracts of the bank as the fiscal agent of the State, though made with-

out authority, and is not bound at all by other acts done without authority. If a trespasser makes rails on my land out of my timber, I may keep the rails, but surely I am not bound to pay his hands. I take the benefit of his wrongful act, but do not render myself liable for his act by which the benefit was accomplished.

The following language is held by the court in *United States* v. *McRae*, 8 Law Rep., 84, Eq.: "The moneys, goods and treasure, which were, at the outbreak, the public property of the plaintiff, and which were seized by the rebels, still continued their moneys, goods and treasure, their right of property and rights of possession being nowise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion, any of such moneys, goods or treasure, or the produce thereof, capable of being identified or earmarked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, a *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution, *simpliciter*. If he had received it as an innocent factor, banker, or other agent, the right to restitution would be, or might be, of a more qualified or limited kind. It would be, or might be, subject to any claim or lien which in his character of innocent bailee without notice he might have." The rights would depend upon the law of bailment, etc.

The case of White *v.* Texas, 7 Wall., 700, cited by the counsel for the depositors, is not one of a contract repudiated by the Government of the State, but one in which a defendant was seeking to screen himself from liability, because the contract which he made was with the Government subsequently overturned, and it clearly establishes the right of a State to claim the benefits of the act of a Government since overthrown. But it will hardly be insisted that every expenditure of that uprooted Government is of binding force upon the present State of Texas.

It is said the policy of courts is to restrict the effects of war

within the narrowest limits possible. This is not denied; but the disposition of courts is one thing, and their power, theoretically, at least, quite a different one. They may and ought to have the disposition to restrict, but it is not for them to fix the limit, when the political power has set a boundary for them.

The principle that there can be no interregnum is true in one sense. It is utterly misleading in the sense in which the counsel for the depositors uses it. It is true, courts and laws recognize *de facto* Governments, but it is not true at all that they are bound by the positive law of nations to abide by everything they do. It is a part of the law of England that a man, by adhering to a king *de facto*, does not incur the penalty of treason; but does that statute of Henry VIII go any further. It would be rather a more liberal construction than the law authorizes, to hold that by reason of this statute a nation was bound by any contract which a Government established for a day might make.

But it is said the bank is a mere trading corporation and not the State. I by no means admit this in the broad sense in which it is stated. But I do admit that the bank is a corporation, just to the extent that it is subject to suit, and it may make such contracts as the State has, by its charter, directed, or as it may by statute direct. Otherwise than for the purpose of suit, and of holding property, it is not separate from the State. It is a mere *State agency*, controlled by the State; its acts directed by the State; every act responds to the pulses of the State itself. Whenever the State is overthrown, the acts of the State are overthrown, and the acts of this agency, under the direction of the uprooted party in the State, go with the party. It was authorized by that party, and by that alone. If they prevail, the acts are valid; if they sink, the acts, as legal, binding acts, sink under the wave that submerges their author. The acts of their agent are not the acts of the lawful State bank; the contract is not hers. They may be the acts of the bank of that uprooted Government, but they are not the acts of the bank of that State Government which now stands upon the ruins of the

old. This is what the schedule of 1865 declares. This is what the act of 1866 (Feb. 16,) ch. 28, sec. 5, carries into the assignment.

The bank of Tennessee is as much the creature and agent of the State as if it was the Treasury itself; as much so as the Fiscus of the German States, where the Treasury is what we would call a corporation, subject to suit. Of course, such an ideal existence must have its legal existence with the Government of which it is part, and be subject to its fate. It is supposed that this argument is like that which was urged against the bank when it was first chartered, that it was not a valid corporation, because it had no individuals named as corporators. In truth, the view I take and that, are antipodal. I look exclusively at the substance, that stuck in the bark. I say the legislature might declare the *Treasury safe* subject to suit, or the Treasury, and it would be so. As to the bank, it sets apart a particular fund, and allows that fund to be reached by a suit in a particular form against the bank. But the suit is, in substance, against that particular fund of the State, and so far a suit against the State, in substance, but not in form. It is clothed with certain incidents appertaining to individuals by the law of its creation, but it has only a formal existence separate from the State. Subject the Treasury to suit, and it will separate to the same extent, nearly.

It is just on this point that the acts of the bank and those of individuals differ. Natural persons may, in a state of war, make contracts among themselves, which are binding and obligatory, without reference to who prevails in the contest, and such contracts cannot be disturbed; but where the validity of the obligation depends upon the power to make it, and the power to make it depends upon which party the war decides to be the Government, the principle to be applied differs *toto cælo*. Here, the case of White *v.* the State of Georgia is distinguished from the present case. That was a contract before the war, and valid. Of course, the war could not affect it, and the obligation not depending on the result of the war, the State could not pass any law to impair it, after the war was over. The distinction is between impairing the obligation of

a contract, and declaring a contract void for want of authority to make it.

Take the instance of the Franklin Government, and suppose it to have seized upon the trustee of one of the counties it had assumed to control, and had, through him, attempted to force the county into contracts; would North Carolina have been bound to respect such contracts, or was it at liberty to say such are not the contracts of the county, but only of your agents therein, and they are not binding?

War Bonds.

The war bonds are, of course, void, under the amended Constitution of the United States. (See Hanauer *v.* Woodruff, 15 Wall., 439.)

The policy of this repudiation by the requirement of the United States is not a matter of punishment, of *delictus*, but simply an exercise of the power in the successful party to disown the acts of the Government which has been overthrown. No man—however little he sympathized with the Confederate States, or how reluctant soever he might be to buy a bond—could recover on the bond, or the consideration he gave for it. That does not reach or affect the basis of the refusal. The prohibition is universal and indiscriminate. The prohibitions of a statute cannot be applied by the courts to A, and turned aside from B, when both are equally within its terms, because one is obnoxious to its policy, and the other is supposed to have acted from motives not within its policy.

Cases in Tennessee.

In the case of Williams *v.* The Register of W. Tenn., (Cooke, 217, 218, 219,) a case argued by Haywood, Whiteside, and Cooke, for plaintiff, and by Balch, for defendant, Overton, Judge, says: "This part of the Constitution, as to compelling the State to do an act which, in morality and justice, it ought to perform, must be viewed as a dead letter until some mode of proceeding shall be pointed out by the Legislature." As yet, no method has been pointed out.

"The obligation contracted by the State, * * * we have no doubt, the State is morally bound to comply with; but does the Constitution or the nature of our Government furnish the means to the judicial department to compel an observance of this contract in issuing a grant, when the State has expressly said it will not issue one. The State has, by its act of 1809, prohibited its officers from issuing a grant or grants on this warrant. Is it proper that the judicial department should order these officers to do an act that is forbidden? * * * Political considerations may interfere to prevent a State, temporarily, from discharging a moral obligation. * * * The court cannot but perceive that to grant a *mandamus* in this case would, in effect, sanction the idea that the State may be sued. * * * On general principles, the idea of an individual citizen or subject compelling the sovereign to do an act is repugnant to every idea of sovereignty. It is true, the Constitution has said the Legislature shall have power to provide a remedy. This, however, they have not done; and until it is done, it is not in the power of the court to do that to which the Legislature are competent. Suppose the State indebted to an individual, this court could not grant a *mandamus* compelling the treasurer to pay it."

"There is an obligation, morally speaking, but it is an imperfect one, and the Legislature has not thought it proper to give to the judicial department any power or means to compel the performance of it. Until the power shall be communicated, there can be no legal power whatever vested. For the purpose of administering justice, the Constitution has vested in the different departments certain powers. Each department has its province marked out, within which, as within their respective orbits, each must move without collision; then the Constitution will be preserved from destruction. An assumption of power by one branch of the Government, which properly belongs to another, weakens the main pillar on which it rests. By repeated acts of assumption, the fabric totters, falls, and with it all that is valuable.† * *

†See, to the same effect, Rhode Island *v.* Massachusetts, 12 Pet., 721–2.

It is the province of the judicial department to determine between man and man, and not between the State and its citizens, where there is no vested perfect right to a grant, legal or equitable. * * * With the view we now possess of this subject, the act of 1809 seems to be void, on account of its repugnance to the provisions of the Constitution, but this court cannot perceive that it possesses any physical power to compel the State to issue a grant."

The case of the Justices of Cannon County *v.* Hoodenpyle, (7 Hum., 146,) is a very instructive one on the subject of the power and jurisdiction of courts over public bodies, for which reason I quote the words of the opinion. That was an application for a *mandamus* to compel a County Court to levy a tax: "The power is given, granted to the justices, and not the duty imposed; within their limited sphere they have a discretion to exercise of the same character with that of the Legislature itself. They will inquire into the state of the debts of the county public, and into the means of the same public. It is their moral and political duty so to exercise this power as to preserve good faith, and to maintain the public credit in a healthful condition. If they omit to do this, the correction must be sought for among their constituency in enlightened and honest public sentiment. There is no principle upon which the judicial department can compel the exercise of this subordinate taxing power which would not justify the same mandatory supervision over the taxing power of the Legislature itself. *No one would claim this for the courts.* They have no more power to assess, or command the assessment of taxes, than the Legislature has to adjudge or to command the adjudication of law suits; and while the courts, as is their duty, shall firmly maintain themselves, with reference to the other departments, in the exclusive exercise of the judicial power, it becomes them to avoid encroaching upon the other departments of the Government in the discretionary exercise of political power. It would be a great evil, deeply to be deplored, if the Legislature should, at any time, fail to sustain the public faith and credit, by fully discharging the debts of the State. But that evil cannot be averted by the

courts awarding against them a peremptory *mandamus*, to assess taxes adequate to the payment of the public debt; because, to attempt this, would be going beyond the sphere in which judicial power is properly exercised. It is an evil of less magnitude, but still a great evil, for a county to omit to provide for the payment of its debts; but that evil cannot be corrected by compulsory steps, on the part of the courts, to enforce assessment of taxes. If, owing to the pressure of the times, the general embarrassment of the community, or the like cause, influencing the exercise of the taxing power by the County Court, they should abate the county assessment below the limits of their power, every creditor, for whatever sum, might, upon the principle upon which this *mandamus* was issued, file an application in the Circuit Court, ascertain his debt, and obtain his order on the County Court to levy a tax and pay his debt."

"But it is argued, very strenuously, that these relators are entitled to some remedy, and that there is no other remedy, except that furnished by *mandamus*. Many grievous wrongs may be imagined as possible to result from the exercise or non-exercise of political power, in the legislative and executive departments, which cannot find a remedy in the courts of justice."

IN THE SUPREME COURT OF THE UNITED STATES.

No. 83.

THE STATE, EX REL. JAC. BLOOMSTEIN,

vs.

THOMAS H. SNEED, TAX COLLECTOR.

J. B. HEISKELL, ATTORNEY GENERAL, FOR DEFENDANT.

SUPPLEMENTAL BRIEF.

I have not desired in this case to present the question raised by the court upon the act of 1873, as a remedy substituted for the supposed remedy by *mandamus*, for several reasons, among which is the fact that I confidently rely upon the point decided in the court below, that there was no remedy by *mandamus*, by the law of Tennessee, to be affected by the act of 1873, or for which any substitute is required. The State court held that the Circuit Court, in which this *mandamus* was instituted, had no jurisdiction of a *mandamus* against a tax collector. This was conclusive of the whole case before them, and there was no occasion or cause for them to go one step beyond this. Any other points decided in a cause of which the Circuit Court had no jurisdiction, and of which, of course, the Supreme Court had none, was merely intended for moral effect, but was not properly a judicial decision. It was, as I have already said in my former brief, purely a question of State law, the jurisdiction of a State question, in the determination of which was not drawn in question any clause in the Constitution of the United States, or any statute or treaty of the United States, and in which, therefore, there was nothing upon which the jurisdiction of this court could attach.

It is true that they do, after determining the case on this question, go on and discuss other questions, and, by way of cumulative reasons, they do state matters which do affect rights claimed under the Constitution of the United States. But nothing is better settled than this, that where the State court has decided a case on a question that is not federal in its character, and that ground is conclusive of the case, this court will not entertain jurisdiction of the cause to decide gratuitously federal questions that cannot affect the judgment. This is what Mr. Smith wishes the court to do. If you are satisfied that you cannot reverse this case for want of jurisdiction, or any other cause, still, he desires that the court will express opinions about the other matters involved in the general controversy, although such delivery must evidently be unjudicial and improper. I do not desire to have any question in which the State I represent is concerned declared upon in a case in which the State court, from which this case comes, had no jurisdiction. When we come to a case of which the court has possession, it will be time enough for the court to declare its views judicially. Until then, and while its utterances would be unjudicial, I must protest against Mr. Smith's request that the court shall decide anything more than the question of the jurisdiction of this Honorable Court.

In Cook *v.* Gray, 2 Houston, 471, (Del.,) it is stated, as the rule of the Supreme Court of the United States, as the "settled practice of the court, never to decide so grave a question as the constitutionality of a State law, unless the question were necessarily involved in the decision of the case before the court."

A court ought not to decide upon the merits of a question when it has decided that it has no jurisdiction of the case, McClung *v.* Silliman, 8 Wheat., 602, and they will, in error, act upon the decision on jurisdiction as if no other point were decided. Howard *v.* Kentucky Ins. Co., 13 B. Monr., 282; Mail Co. *v.* Flanders, 12 Wall., 135. On a certificate of division on jurisdiction, and as to merits, if this court is equally divided on the question of jurisdiction, "no opinion can properly be expressed on" the merits. "These

* questions can become material only, or be inquired into after jurisdiction has been entertained in the cases, and the court bound to proceed to a final disposition of them." Silliman *v.* Hudson Riv. Br. Co., 1 Black, 584; Chas. Riv. Br. *v.* Warren Br., 17 Pet., 585. This necessarily results from the fact that a judgment of a court, in a matter of which it has no jurisdiction, is void. It cannot even give costs, from a defect of power. Burnham *v.* Rangeley, 2 Woodb. & M., 420, and full review of cases there.

This court, as an appellate court, has nothing to do with ascertaining the nature and extent of the jurisdiction of the State court over any persons or parties or subject-matters given by State laws, or as to the mode of exercising the same, except so far as respects the very question arising under the 25th section of the act of 1789, chapter 20.

The courts of every country are the exclusive judges of their own jurisdiction, so far as depends on their own municipal law. Rose *v.* Himely, 4 Cr., 241; s. c., Bee, 300; Grignon *v.* Astor, 2 How., 319.

"It must be conceded that the court of *dernier ressort* in every State decides upon its own jurisdiction, and the jurisdiction of all inferior courts to which its appellate power extends." Davis *v.* Packard, 8 Pet., 323, Marshall, C. J. And this was in a case where the State court exercised the power in avoidance of the judgment of this court.

"A judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is on other courts. Grignon *v.* Astor, 2 How., 341, 342.

For this and other reasons, and because I an entirely satisfied that in the absence of jurisdiction this court will not go into a question on the merits, I prefer not to place this case upon the equivalent remedy. That may be a federal question, and may open the way to other questions, though I suppose if this court held that the act of 1873 gave an equivalent remedy, they must, of course, conclude that the act of 1873 did not impair the obligation of any contract, and so did not violate the Constitution of the United States, and so raised no

question beyond that for the determination of this court. This would seem to result; but it is not clear to my mind, as the conclusion first above stated, is clear. No right to maintain such suit as is here brought by *mandamus* against a tax collector ever existed in Tennessee, because such was the holding in Williams *v.* the Register, supported by English authority, and followed by the Supreme Court of Tennessee in the case at bar.* No jurisdiction existing in the State court, a decision of that fact involves no question under a law, treaty, or clause of the Constitution of the United States. *Ergo?* this court has no jurisdiction. If there are other questions which, in the absence of this, would give jurisdiction, still, as this is conclusive in any view that can be taken of the other questions, and as they can in no manner affect the result, this court will not declare opinions on those questions.

With this protest against going into the act of 1873, I proceed to furnish the authorities on the point raised by the court. If Mr. Smith had set to work upon the side of the question which was suggested by the court as the true view, he would very readily have found much more authority. A search on that side, *not arduous*, has not been fruitless.

But before I present the cases found in one afternoon, let me say that Walker *v.* Whitehead, (16 Wall., 317,) which Mr. Smith presents as a case where the remedy was clogged, not taken away, was one in which the clogs were put on *ex post facto*, and wherever they were clogs at all were insuperable, as was the case in the cause then on trial; that is, the law required that certain taxes should have been paid, which were not in that case paid, and the law made no provision for any payment after its passage. In that case the tax had not been paid, and the law was an insuperable bar. The remedy was not *clogged*, but *taken away*. Further, that act gave defenses which destroyed the very obligation of the contract.

The leading case on this subject, decided in 1819, Sturges

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* See also Michigan State Bank *v.* Hastings, Walk., 9, where a suit against an auditor to reach the State, was held a suit against the State, and not maintainable.

v. Crowninshield, 4 Wheat., 122, declares that, without impairing the obligation of the contract, the remedy may be modified, as the wisdom of the Legislature shall direct.

In 12 Wheat., 378, Mason *v.* Haile, it is said: "Can it be doubted but the Legislatures of the States, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such a law might extend to present as well as future imprisonment. * * * This is a measure which must be regulated by the views of policy and expediency entertained by the State Legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms part of such remedy. The doctrine of the court in Sturges *v.* Crowninshield, 4 Wheat., 400, applies with full force to the present case. 'Imprisonment of the debtor,' say the court, 'may be a punishment for not performing his contract, or may be allowed as a means for inducing him to perform it. But a State may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.'"

This is followed by Bronson *v.* Kinzie, 1 How., 311. "Undoubtedly a State may regulate at pleasure the modes of proceeding with courts, in relation to past contracts as well as future. It may for example shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every soverignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. And, *although a new remedy may be deemed less convenient*

than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution. "But it is manifest that the obligation of the contract and the rights of the party under it may be seriously impaired, by denying a remedy altogether or by burdening the proceeding with new conditions and restrictions so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered them with conditions that rendered it useless or impracticable to pursue it."

In 11 Peters, 581, Mr. J. McLean says that, after a careful examination of the questions adjudged by the Supreme Court, they seem not to have decided that the contract is impaired within the meaning of the Federal Constitution, where the action of the State has not been on the contract.

This court, and various State courts, have held that the abolition of imprisonment for debt is no impairment of the obligation of a contract. Mason *v.* Haile, 12 Wheat., 573; Oriental Bank *v.* Freese, 18 Me., 113.

Yet, certainly, there is a large class of cases in which this was the only remedy, as where the debtor had money, but no other property, and refused to pay; coercion, through restraint of liberty, was the only effectual remedy.

In Woods *v.* Buie, 6 Miss., 5 How., 285, it was held that the allowance of a term to imparl was not in violation of the constitution, though it gave a term's delay.

In Read *v.* Frankfort Bank, 23 Me., 318, it was held that the repeal of the charter of a bank under a power reserved which took away the suit against the bank, but the same act substituted a suit against the receiver, was not violative of

the constitution. The court say, "a remedy for a party may be changed or wholly taken away by the Legislature without contravening the Constitution of the United States. And such a change may constitutionally affect suits pending at the time when it is made."

In Thayer *v.* Seavy, 11 Me., 291, it was held that an act taking away the action of debt for the escape of a debtor, and giving case, was not a violation of the constitution, though it substituted actual damages, measured by the debtor's ability to pay, for constructive damages, measured by the whole debt. Citing 8 Mass., 468; *Ib.*, 360; 12 Mass., 443; 8 Mass., 445.

In 9 Barb., 485, James *v.* Stull: "The Legislature cannot deprive a party of this right, (to enforce a contract,) or of the means to enforce it, but it may undoubtedly change time and mode and process and forum at its pleasure, so that the binding obligation and the right to enforce it remain essentially unimpaired, and some adequate means are still secured."

In 3 Grant's Cases, (Pa.,) Huntzinger *v.* Brock: "The Legislature * * * may alter or abridge the remedy for a breach of a contract, provided the alteration be not so great and unreasonable as to amount to a substantial impairing of the contract obligations." See also Evans *v.* Montgomery, 4 Watts & Serg., 218.

In 1 McLean, 36, Bank of United States *v.* Longworth, it was held that an act which gave to a judgment an unlimited lien might be repealed and a lien limited to one year substituted.

In United States *v.* Conway, Hempst., 313, a stay law was held valid.

Remedy, by forcible entry and detainer, taken away by statute held valid. Drehman *v.* Stifle, 8 Wal., 599, Swayne, J. Yet that was taking away a summary remedy and leaving one much more difficult to maintain.

And see cases cited in brief, in Bruce *v.* Schuyler, 9 Ill., 253, *et seq*, which is an exhaustive review of cases.

J. B. Hasbrouck
A. H. Gove

which took away the suit against the bank, but the same act substituted a suit against the receiver, was not violative of

Supreme Court of the United States.

October Term, 1877.

THE STATE OF TENNESSEE, EX RELATIONE JACOB BLOOMSTEIN,
vs.
THOMAS H. SNEED, COLLECTOR.

No. 83.

Supplemental Brief of R. McP. SMITH, *Counsel of Appellant.*

The following is the legislation of 1873 that is drawn in question:

Act of February 28, 1873, (Acts 1873, p. 15:)

"SEC. 2. *Be it further enacted*, That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds, or property; and all such suits, now pending or hereafter brought, shall be dismissed as to the State, or such officers, on motion, plea, or demurrer of the law officer of the State or counsel employed for the State."

Act of March 21, 1873, (Acts 1873, pp. 71–3:)

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That in all cases in which an officer charged by law with the collection of revenue due the State shall institute any proceeding or take any steps for the collection of the same, alleged or claimed to be due by said officer, from any citizens, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal or against any statute or clause of the constitution of the State, pay the same under protest; and upon his making such payment the officer or collector shall

pay such revenue into the State treasury, giving notice at the time of payment to the comptroller that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the officer having collected said sum, for the recovery thereof, and the same may be tried in any court having jurisdiction of the amount and parties; and if it be determined that the same was wrongfully collected, as not being due from the said party to the State, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded; and thereupon the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury.

"SEC. 2. *Be it further enacted*, That there shall be *no other remedy* in any case of the collection of revenue, or attempt to collect revenue, illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other and different funds than such as the tax-payer may tender or claim the right to pay than that above provided; and no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue,—either injunction, *supersedeas*, prohibition, or any other writ or process whatever, but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and *in no other manner*."

* * * * * * * * * * * *

"SEC. 5. *Be it further enacted*, That nothing in this act shall be so construed, or have the effect, to subject any officer of the State to any suit for a refusal on his part to accept in payment of revenue to the State any kind or description of funds or securities or papers other than such as he may be authorized and required to receive for the time being by law."

I have made an arduous but fruitless search for something like direct authority on the point upon which leave was given me to submit an additional brief.

I find plenty of diverse decisions upon the general subject of the legislative power over the remedy; but these are familiar to the court. Mr. Sedgwick, in his work upon constitutional and statutory law, (second edition, pp. 629–30,) says:

"The tendency of the later decisions is to treat the substantial remedy provided by the laws in existence at the time of the formation of the contract as a material part of the contract; and that any legislation which *materially impairs* the vigor and efficiency of that remedy *in just so far* impairs the contract."

In the same vein is the following language of Mr. Jus-

tice Swayne in *Walker* v. *Whitehead*, (16 Wall., 317,) a case where the remedy was clogged but not taken away:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, *and enforcement*. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are *parts of the obligation* which is guaranteed by the Constitution. The obligation of the contract is *the law which binds the parties to perform their agreement*."

Among the State courts whose later utterances upon this point have the right ring is the Supreme Court of Tennessee, which in *Webster* v. *Rose* (6 Heiskell, 93) held thus—I transcribe the syllabus:

"The obligation of a contract is twofold: 1, moral; 2, legal. It is only the latter with which legislatures and courts have to deal. And it is the *legal compulsion* or obligement which enters into a contract when it is made, and forms a part of it, that constitutes the obligation protected by the Constitution; and, as essential to this protection, the Constitution *intends that the legal means of enforcing contracts shall not be impaired or rendered less effective*.

"The legislature has complete control over the *form* of the remedy and mode of proceeding, but can in no case, directly nor indirectly, if such be the purpose of the enactment, render the remedy *less effective* for the enforcement of the obligation than when the contract was made."

The court explain what they mean by the *form* of the remedy, viz: that *debt* might be substituted for *assumpsit*, or an action on the facts of the case for either, &c.

On pp. 102–3 of the report they say:

"If the legislature can enlarge the time one day, in which the party is to perform what the legal obligation of

his contract requires at the time it is entered into, it may do it for one hundred days; and if for this period, then it may equally do it for one hundred years."

A stay law was here pronounced unconstitutional.

Of course, the legislature might indirectly and consequentially, by altering the terms of the courts, retard the realization of the right. Yet the court say that a stay law for one day would be void.

The direct purpose and effect of the act seems to be the criterion.

I may injure a party grievously; but if my conduct was not the proximate cause I would not be liable; but I would be liable for the slightest injury directly and proximately occasioned. We cannot grasp what is remote and consequential, so complex and inter-related are human affairs; but we are not for this reason to relax our hold upon what is direct and proximate.

In *Blair* v. *Williams*, (4 Littell, Ky., 35,) a law passed after a contract was made, extending the time of replevin, on a judgment rendered on such contract, was held to impair the obligation of the contract, and to violate the Constitution of the United States—the law, while it did not seek to alter the terms of the contract, yet attempting to annex a legal incident to the remedy which did not exist when the contract was made.

The court said here, and in *Lapsley* v. *Brashears* (p. 58) of the same report, that *the legal obligation of the contract consists in the legal remedy for enforcing it.*

In *Maloney* v. *Fortune*, (14 Iowa, 417,) and in *Cargill* v. *Power*, (1 Mich., 369,) it was held that an extension of the time for redemption of property sold under a pre-existing mortgage was unconstitutional.

A law forbidding execution sale of property for less than two-thirds of the appraised value, was held void as to pre-

existing contracts, in *Willard* v. *Longstreet*, (2 Doug., [Mich.,] 172.)

The supreme court of Tennessee has held that an extension of the homestead exemption is void as to pre-existing contracts. The case has not yet been reached by the reporter, as our reports are unavoidably several years in arrears, and so I am unable now to produce it.

There are some latitudinary State decisions on this point; but they belong to just that class of State decisions against which this court is the bulwark of the citizen.

1. Now, other things aside, if a stay law for one day, or a short extension of the time of redemption after a foreclosure sale, is unconstitutional as to pre-existing contracts, how much more so a law which deprives the new-issue holder of his remedy to compel the receipt of his money for taxes *at once*, and substitutes merely a recovery against the collector, to result consequentially in the receipt of the tender, after payment in par funds, and at the end of the law's delay?

The note-holder is entitled to have his money received *when tendered*. He is entitled to be free from the burden of paying taxes in the first instance in other funds. He may not have the other funds. He cannot, under the act of 1873, institute any proceedings to enforce his right without first paying in the funds exacted. If he cannot pay, his property is to be levied on and sacrificed. He cannot after the tender then stop the collector until the legality of the tender is determined. The legislation complained of enacts that he shall have "*no other remedy*" than that provided. Surely this is an unconstitutional abridgement of the remedy existing at the time when the notes were issued, by which their receipt could be promptly compelled, without the burden of an advance of any other funds. In place of this, the act of 1873 requires payment, and puts the

party to the law's delay to recover his money, and establish his tender.

2. But the act of 1873 is not understood by us to operate as suggested. Had the State supreme court thus construed the act, they would doubtless have denied the *mandamus* on the ground of the sufficiency of the remedy, instead of the far-fetched grounds on which they placed the denial.

The attorney-general of the State did not recognize that as the operation of the act, else he would have pressed that view of it, which he did not do even after the suggestion was made.

The act of 1873 is framed to meet the case only of a contest against the *entire tax*. Sec. 2 was stuffed into it without reflection as to the want of adaptation of the remedy of sec. 1 for the case of sec. 2. A Tennessee court would give a new-issue holder, if anything, only the *difference* between the value of his tender and the funds exacted; and thus his new issue would never get received for taxes. (See my printed argument, pp. 17–18.)

The State court and the attorney-general tacitly conceded the correctness of the view of the act of 1873 there presented.

3. But concede the suggested view of the nature and operation of the act of 1873, yet at last (aside from the abridgement and clogging of the note-holder's remedy thereby, already pointed out) it affords no *remedy*, but leaves the party simply to the State's good faith—truly a broken reed to lean on when the bank in question is involved, as this record shows.

She failed to put into the bank $1,400,000 of the promised amount. She refuses to comply with her contract to make good to the capital stock any losses. She tried to appropriate all of the assets to her school fund, and to cheat all of the creditors out of everything. She tried

to repudiate the old issue. She tried, and is trying, to repudiate the new issue.

After the new-issue holder tenders, pays under protest, sues, and recovers, and the court grants its certificate, yet he cannot *compel* the comptroller to give him his warrant on the treasurer. According to the doctrine of the court in this very case, *that* would be a suit against the State. Even if he gets the warrant from the comptroller, he cannot *compel* the treasurer to pay it; for that, too, according to this doctrine, would be a suit against the State.

A suit against the State is a mere boon, liable to be withdrawn at any time; not a remedy.

A remedy implies legal *compulsion*.

The analogy of the Court of Claims was suggested. This court, in entertaining appeals therefrom, hold that that is in the exercise of judicial power. That is all. A party may, of course, have legal rights against a sovereign. And to pronounce upon these authoritatively is to exercise judicial power—"*jus dicere*." *Non constat*, that the party whose rights are thus judicially ascertained has *a remedy* to enforce them against the sovereign. In a loose, popular sense, recourse to the Court of Claims may be termed a remedy; not in a strictly proper constitutional sense.

It was by sec. 12 made the duty of the collector to receive our money for taxes. We are, by virtue of the State's contract, entitled to *enforce* the performance of this duty.

Suppose that a constitutional amendment had undertaken to take away from the new-issue holder all remedy except the right to sue the State *co nomine* in any of her courts, it being made the duty of the next legislature after the recovery, if any, to provide for paying off the judgment, would *that* have been a constitutional substitute for our *mandamus*?

While the punctual good faith of the United States may